



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 433 257



HARVARD LAW LIBRARY

Received MAY 2 1918

195

NEW JERSEY LAW REPORTS.

VOLUME XC.

GUMMERE V.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

AND, AT LAW, IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY

CHARLES E. GUMMERE, Reporter.

°

VOLUME V.

NEWARK, N. J.:
SONEY & SAGE.

1917

This volume contains the opinions delivered in the Supreme Court at the February and June Terms, 1917, and also the opinions in cases at law in the Court of Errors and Appeals at the November Term, 1916, and March Term, 1917.

iv

MAY 2 1918

**PRINTED BY THE
STATE GAZETTE PUB. CO.,
TRENTON, N. J.**

NEW JERSEY REPORTS.

LAW REPORTS.

COXE'S REPORTS,	- - - - -	1 vol.
PENNINGTON'S REPORTS.	- - - - -	2 "
SOUTHARD'S	" - - - - -	2 "
HALSTED'S	" - - - - -	7 "
GREEN'S	" - - - - -	3 "
HARRISON'S	" - - - - -	4 "
SPENCER'S	" - - - - -	1 "
ZABRISKIE'S	" - - - - -	4 "
DUTCHER'S	" - - - - -	5 "
VROOM'S	" - - - - -	56 "
GUMMERE'S	" - - - - -	5 "

EQUITY REPORTS.

SAXTON'S REPORTS,	- - - - -	1 vol.
GREEN'S	" - - - - -	3 "
HALSTED'S	" - - - - -	4 "
STOCKTON'S	" - - - - -	3 "
BEASLEY'S	" - - - - -	2 "
McCARTER'S	" - - - - -	2 "
C. E. GREEN'S	" - - - - -	12 "
STEWART'S	" - - - - -	18 "
DICKINSON'S	" - - - - -	21 "
ROBBINS'	" - - - - -	4 "
BUCHANAN'S	" - - - - -	15 "
B. STOCKTON'S	" - - - - -	1 "

**Justices of the Supreme Court During the Period of
these Reports.**

CHIEF JUSTICE

HON. WILLIAM S. GUMMERE.

ASSOCIATE JUSTICES.

HON. CHARLES G. GARRISON.

“ **FRANCIS J. SWAYZE.**

“ **THOMAS W. TRENCHARD.**

“ **CHARLES W. PARKER.**

“ **JAMES J. BERGEN.**

“ **JAMES F. MINTURN.**

“ **SAMUEL KALISCH.**

“ **CHARLES C. BLACK.**

ATTORNEY GENERAL

HON. JOHN W. WESCOTT.

CLERK.

WILLIAM C. GEBHARDT, Esq.

Judges of the Court of Errors and Appeals.

HON. EDWIN ROBERT WALKER, CHANCELLOR.

" WILLIAM S. GUMMERE, CHIEF JUSTICE.

" CHARLES G. GARRISON,

" FRANCIS J. SWAYZE,

" THOMAS W. TRENCHARD,

" CHARLES W. PARKER,

" JAMES J. BERGEN,

" JAMES F. MINTURN,

" SAMUEL KALISCH,

" CHARLES C. BLACK,

*Associate
Justices
of the
Supreme Court.*

Judges Specially Appointed.

HON. JOHN J. WHITE.

" HENRY S. TERHUNE.

" ERNEST J. HEPPENHEIMER.

" ROBERT WILLIAMS.

" FRANK M. TAYLOR.

" WALTER P. GARDNER.

CLERK.

THOMAS F. MARTIN, Esq.

TABLE OF CASES REPORTED IN THIS VOLUME

A.

Ackerman ads. Seglie.....	118
Albrecht v. Pennsylvania Railroad Co.....	293
Allen ads. Collings.....	5
American Woolen Co. v. Edwards.....	69, 293
Armbrecht v. Delaware, Lackawanna & Western R. R. Co.....	529
Atlantic City ads. Fennan.....	674, 675, 676, 677
Atlantic City ads. Fenton.....	403
Atlantic City ads. Irwin.....	99
Atlantic City ads. McAllister.....	93
Atlantic City & Suburban Gas & Fuel Co. ads. Reed.....	231
Atlantic Coast Electric Railway Co. v. State Board of Taxes and Assessments	353
Attorney-General v. Verdon.....	494

B.

Baldwin ads. Martin.....	241
Bauer v. West Hoboken.....	1
Bayhead ads. Dale.....	49
Bell ads. Deck.....	96
Belleville ads. Jerolaman.....	206
Belmont Land Association v. Garfield.....	394
Bender ads. Shaw.....	147
Benjamin & Johnes v. Brabban.....	355
Bennett Gravel Co. ads. Cook.....	9
Bernards Township ads. Newark Homebuilders Co.....	361
Betts v. Massachusetts Bonding & Insurance Co.....	632
Beverly ads. Buohl.....	44
Blackmore ads. Bonfield.....	252
Blanda ads. Consolidated Gas & Gasoline Engine Co.....	135
Board of Conservation and Development ads. Society for Estab- lishing Useful Manufactures.....	469
Board of Education of Bayonne ads. Schwarzrock.....	370
Board of Education of Jersey City ads. Frank.....	273
Bonfield v. Blackmore.....	252
Booth & Bro. v. Glasser.....	91
Borst ads. Jersey City.....	454
Bouquet v. Hackensack Water Co.....	203
Brabban ads. Benjamin & Johnes.....	355
Bradford v. DeLuca.....	434
Brandes ads. Brunhoelzl.....	31

Brann & Stewart Co. ads. Hansen.....	444
Brant ads. Whitcomb.....	245
Breidt Brewery Co. v. Weber.....	641
Brinsko v. Lehigh Valley Railroad Co.....	658
Browne v. Hagen.....	423
Brunetti v. Grandi.....	679
Brunhoelzl v. Brandes.....	31
Brunswick Motor Co. ads. Chrisafides.....	313
Buohl v. Beverly.....	44
Burlington County Farmers' Exchange ads. Stuart.....	584
Burnett v. Superior Realty Co.....	660

C.

Cahill v. West Hoboken.....	398
Carson v. Scully.....	295
Carton v. Trenton & Mercer County Traction Corporation.....	311
Caruso v. Montclair.....	255, 312
Catholic Benevolent Legion ads. McGuire.....	224
Central Railroad Company of N. J. ads. Collins.....	593
Central Railroad Company of N. J. ads. Rounsaville.....	176
Chrisafides v. Brunswick Motor Co.....	313
Christy v. New York Central & Hudson River R. R. Co.....	540
Ciesmelewski v. Domalewski.....	34
Clowney ads. Hellemann.....	87
Cohen ads. Heckman.....	322
Colletto v. Hudson & Manhattan R. R. Co.....	315
Collings v. Allen.....	5
Collins v. Central Railroad Company of N. J.....	593
Collins ads. Wheaton.....	29
Commercial Casualty Insurance Co. ads. Cross.....	594
Commissioners Palisades Interstate Park ads. Ross.....	461
Common Pleas of Hudson ads. Safety Insulated W. & C. Co....	114
Connolly Co. ads. Crossley.....	238
Consolidated Gas & Gasoline Engine Co. v. Blanda.....	135
Cook v. Bennett Gravel Co.....	9
Cooney v. Rushmore.....	665
Cramer ads. Peoples National Bank.....	655
Crane v. Jersey City.....	109
Crossley v. Connolly Co.....	238
Crossley ads. Kitchell.....	574
Cunningham ads. Ireson.....	690
Curtis v. Joyce.....	47

D.

Dale v. Bayhead.....	49
Daly v. Garven.....	512
Darville v. Freeholders of Essex.....	617
Deck v. Bell.....	96
DeGroff v. O'Connor.....	317
Delaware, Lackawanna & Western Railroad Co. ads. Armbrecht..	529

Delaware, Lackawanna & Western Railroad Co. ads. Dickinson..	158
Delaware, Lackawanna & Western Railroad Co. ads. Fortein....	137
Delaware, Lackawanna & Western Railroad Co. ads. Heinz.....	198
Delaware, Lackawanna & Western Railroad Co. ads. Kratz.....	210
Delaware, Lackawanna & Western Railroad Co. ads. Nevich....	228
Delaware, Lackawanna & Western Railroad Co. ads. Sprotte....	720
Delaware, Lackawanna & Western Railroad Co. ads. Van Hoogen- styn	189
De Luca ads. Bradford.....	434
Delker v. Freeholders of Atlantic.....	473
Department of Health of New Jersey v. Monheit.....	448
Devlin v. Jersey City.....	318
Dickinson v. Delaware, Lackawanna & Western Railroad Co....	158
Dilks ads. Jackson.....	280
Di Maria ads. State.....	341
Domalewski ads. Ciesmelewski.....	34
Duff v. Prudential Insurance Co.....	646
Duffy v. Paterson.....	669
Dumont ads. Whitaker.....	383
DuPont De Nemours Co. v. Spocidio.....	488
Durham ads. Earle.....	319
Durkin v. Fire Commissioners of Newark.....	670

E.

Earle v. Durham.....	319
Eberling v. Mutillod.....	478
Eckert v. West Orange.....	545
Edison ads. Grillo.....	680
Edwards ads. American Woollen Co.....	69, 283
Edwards ads. Maxwell.....	707
Edwards ads. Opportunity Sales Co.....	331
Edwards v. Petry.....	670
Edwards ads. Security Trust Co.....	558, 579
Edwards ads. Zabriskie.....	731
Eisele & King v. Raphael.....	219
Eisner ads. Sholes.....	151
Ellis v. Pennsylvania Railroad Co.....	349
Ellison ads. Raab.....	716
Erie Railroad Co. ads. Malone.....	350
Erie Railroad Co. ads. Materka.....	457
Erie Railroad Co. v. Public Utility Board.....	271, 672, 673
Erwin v. Traud.....	289
Essex County Board of Taxation ads. Fidelity Trust Co.....	51

F.

Fagan v. Fire Commissioners of Newark.....	678
Fagan ads. Stark.....	187
Fairview Development Co. v. Fay.....	427
Fairview Heights Cemetery Co. v. Fay.....	427

Fay ads. Fairview Development Co.....	427
Fay ads. Fairview Heights Cemetery Co.....	427
Fennan v. Atlantic City.....	674, 675, 676, 677
Fenton v. Atlantic City.....	403
Ferber Construction Co. v. Hasbrouck Heights.....	193
Ferguson & Son ads. Orlando.....	553
Fidelity Trust Co. v. Essex County Board of Taxation.....	51
Fire Commissioners of Newark ads. Durkin.....	670
Fire Commissioners of Newark ads. Fagan.....	673
Fire Commissioners of Newark ads. Smith.....	719
Fish ads. State.....	17
Fitzgerald ads. Rose.....	717
Fletcher ads. State.....	722
Florey v. Lanning.....	12
Flynn v. New York, Susquehanna & Western R. R. Co.....	460
Fortein v. Delaware, Lackawanna & Western R. R. Co.....	137
Forty-Four Cigar Co. ads. Fox.....	483
Fox v. Forty-Four Cigar Co.....	483
Frank v. Board of Education of Jersey City.....	273
Frank ads. State.....	78
Freeholders of Atlantic ads. Delker.....	473
Freeholders of Atlantic ads. Godfrey.....	517
Freeholders of Essex ads. Darville.....	617
Freeholders of Essex ads. Kelly.....	411
Freeholders of Hudson ads. Kennedy.....	335
Freeholders of Hudson ads. Ross.....	522
Freeholders of Hudson ads. Ruby.....	335
Freeholders of Passaic ads. Peoples Bank & Trust Co.....	331
Freeman v. Van Wagenen.....	358
French & Son ads. Limpert Brothers.....	600
Fuller's Express Co. v. Public Utility Board.....	694
Fullerton & Co. v. Public Utility Board.....	677
Fusco Construction Co. ads. Title Guaranty & Surety Co.....	630

G.

Gaffney v. Illingsworth.....	490
Garfield ads. Belmont Land Association.....	394
Garven ads. Daly.....	512
Gebhardt ads. Pennsylvania Railroad Co.....	36
George ads. Gromer.....	644
Gilbert v. Pennsylvania Railroad Co.....	321
Glasser ads. Booth & Bro.....	91
Godfrey v. Freeholders of Atlantic.....	517
Godstrey ads. Nell.....	709
Gordon v. Pennaci.....	392
Grandi v. Brunetti.....	679
Grillo v. Edison.....	680
Gromer v. George.....	644
Gross v. Commercial Casualty Insurance Co.....	594
Guarraia v. Metropolitan Life Insurance Co.....	682, 685
Gude Co. v. Newark Sign Co.....	686

H.

Hackensack Water Co. ads. Bouquet.....	203
Haddon Heights v. Hunt.....	35
Hagen ads. Browne.....	423
Hamilton Township v. Mercer County Traction Co.....	531
Hammond v. Morrison.....	15
Hanson v. Brann & Stewart Co.....	444
Hart ads. State.....	281
Hasbrouck Heights ads. Ferber Construction Co.....	193
Heckman v. Cohen.....	322
Heilemann v. Clowney.....	87
Heinz v. Delaware, Lackawanna & Western R. R. Co.....	198
Hendee v. Wildwood & Delaware Bay R. R. Co.....	325
Hendrickson ads. New York & New Jersey Water Co.....	537
Hoboken ads. Miller.....	167
Hoff v. Public Service Railway Co.....	386
Hoffman ads. State.....	338
Home Insurance Co. ads Swiller.....	587
Hop ads. State.....	390
Horay ads. McMichael.....	142
Horner v. Margate City.....	406
Houghton v. Jersey City.....	689
Huber ads. Jersey City.....	692
Hudson & Manhattan R. R. Co. ads. Colletto.....	315
Hudson & Manhattan R. R. Co. ads. Jersey City.....	649
Hunt ads. Haddon Heights.....	35

I.

Illingsworth ads. Gaffney.....	490
Ireson v. Cunningham.....	690
Irwin v. Atlantic City.....	99

J.

Jackson v. Dilks.....	280
Jefferson ads. State.....	507
Jerolaman v. Belleville.....	206
Jersey City v. Borst.....	454
Jersey City ads. Crane.....	109
Jersey City ads. Devlin.....	318
Jersey City ads. Houghton.....	689
Jersey City v. Huber.....	692
Jersey City v. Hudson & Manhattan R. R. Co.....	649
Jersey City v. Thorpe.....	520
Johnson ads. State.....	21
Joyce ads. Curtis.....	47

K.

Kells Mill & Lumber Co. v. Pennsylvania Railroad Co.....	325
Kelly v. Freeholders of Essex.....	411
Kennedy v. Freeholders of Hudson.....	335
Keyes ads. Woodbridge.....	67
King ads. Splittorf Electrical Co.....	421
Kitchell v. Crossley.....	574
Koenigsberger v. Mial.....	695
Koettgen v. Paterson.....	698
Kratz v. Delaware, Lackawanna & Western R. R. Co.....	210
Kruchen Co. v. Paterson.....	700

L.

Lanning ads. Florey.....	12
Lehigh Valley Railroad Co. ads. Brinsko.....	658
Lehigh Valley Railroad Co. ads. Lightcap.....	620
Lehigh Valley Railroad Co. ads. Martin.....	258
Lehigh Valley Railroad Co. ads. State.....	340
Lehigh Valley Railroad Co. ads. State.....	372
Leib v. Pennsylvania Railroad Co.....	326
Lightcap v. Lehigh Valley Railroad Co.....	620
Lämpert Brothers v. French & Son.....	600
Loewenthal v. Pennsylvania Railroad Co.....	327
Long Dock Co. v. State Board of Taxes, &c.....	701, 702, 703
Longport ads. Phillips.....	212
Loomis ads. State.....	216
Loveland v. McKeever Bros.....	704
Lowrie v. State Board of Dentistry.....	54

Mc.

McAllister v. Atlantic City.....	93
McCarthy v. West Hoboken.....	398
McGuire v. Catholic Benevolent Legion.....	224
McGurty v. Newark.....	103
McKeever Brothers ads. Loveland.....	704
McMichael v. Horay.....	142

M.

Malone v. Erie Railroad Co.....	350
Margate City ads. Horner.....	406
Martin v. Baldwin.....	241
Martin v. Lehigh Valley Railroad Co.....	258
Martin v. Woodbridge.....	414
Massachusetts Bonding and Insurance Co. ads. Betts.....	632
Materka v. Erie Railroad Co.....	457
Mausoleum Builders v. State Board of Taxes, &c.....	163
Maxwell v. Edwards.....	707
Mercer County Traction Co. ads. Hamilton Township.....	531
Mercer County Traction Co. ads. Rowland.....	82

Metropolitan Life Insurance Co. ads. Guarraia.....	682, 685
Meyer v. National Surety Co.....	126
Meyer v. Public Utility Board.....	694
Mial ads. Koenigsberger.....	695
Michael v. Minchin.....	603
Millburn Township ads. Whittingham.....	344, 348
Miller v. Hoboken	167
Milner ads. More.....	626
Minchin ads. Michael.....	603
Monetti ads. State.....	582
Monheit ads. Department of Health of New Jersey.....	448
Montclair ads. Caruso.....	255, 312
More v. Milner	626
More v. Richards	626
More v. Silver	626
Moriarity v. Orange.....	328
Morrison ads. Hammond.....	15
Morris & Co. v. Public Utility Board.....	694
Musconetcong Iron Works v. Netcong.....	58
Mutillod ads. Eberling.....	478

N.

National Surety Co. ads. Meyer.....	126
Nell v. Godstreya.....	709
Netcong ads. Musconetcong Iron Works.....	58
Nevich v. Delaware, Lackawanna and Western R. R. Co.....	228
Newark ads. McGurty.....	103
Newark ads. New York Telephone Co.....	362
Newark Homebuilders Co. v. Bernards Township.....	361
Newark Sign Co. ads. Gude Co.....	686
Newbaker ads. New York, Susquehanna and Western R. R. Co...	713
New England Casualty Co. ads. Standard Gas Power Corp....	570
New York Central and Hudson River R. R. Co. ads. Christy....	540
New York and New Jersey Water Co. v. Hendrickson.....	537
New York, Susquehanna and Western R. R. Co. ads. Flynn....	450
New York, Susquehanna and Western R. R. Co. v. Newbaker...	713
New York, Susquehanna and Western R. R. Co. v. Public Utility Board	432
New York Telephone Co. v. Newark.....	362
Ninth Street Improvement Co. v. Ocean City.....	106
Nones ads. State	342

O.

Ocean City ads. Ninth Street Improvement Co.....	106
O'Connor ads. DeGroff.....	317
Old Dominion Copper Mining, &c., Co. v. State Board of Taxes,	364
Olivit Brothers v. Pennsylvania Railroad Co.....	328, 329, 330
Orange ads. Moriarity	328
Orlando v. Ferguson & Son.....	553
Opportunity Sales Co. v. Edwards.....	331

P.

Passaic County Board of Taxation ads. Peoples Bank and Trust Co.	171
Passaic Water Co. v. Public Utility Board.....	714
Paterson ads. Duffy.....	669
Paterson ads. Koettegen.....	698
Paterson ads. Kruchen Co.....	700
Paterson ads. Riverside Turn Verein Harmonie.....	717
Parkview Building and Loan Association v. Rose.....	614
Paul ads. Trout.....	62
Pennaci ads. Gordon.....	392
Pennsylvania Railroad Co. ads. Albrecht.....	293
Pennsylvania Railroad Co. ads. Ellis.....	349
Pennsylvania Railroad Co. v. Gebhardt.....	36
Pennsylvania Railroad Co. ads. Gilbert.....	321
Pennsylvania Railroad Co. ads. Kells Mill and Lumber Co.....	325
Pennsylvania Railroad Co. ads. Leib.....	329
Pennsylvania Railroad Co. ads. Loewenthal.....	327
Pennsylvania Railroad Co. ads. Olivit Brothers.....	328, 329, 330
Pennsylvania Railroad Co. ads. Spada.....	338
Pennsylvania Railroad Co. v. Townsend.....	75
Pennsylvania Railroad Co. ads. Wilczynski.....	178
Peoples Bank and Trust Co. v. Freeholders of Passaic.....	331
Peoples Bank & Trust Co. v. Passaic County Board of Taxation,	171
Peoples National Bank v. Cramer.....	655
Petry ads. Edwards.....	670
Philadelphia & Reading Railway Co. ads. West Jersey Trust Co.,	730
Phillips v. Longport.....	212
Phillipsburg Horse Car R. R. Co. ads. Shoemaker.....	235
Prudential Insurance Co. ads. Duff.....	646
Pullis ads. State.....	377
Public Service Railway Co. ads. Hoff.....	386
Public Service Railway Co. v. Public Utility Board.....	715
Public Utility Board ads. Erie Railroad Co.....	271, 672, 673
Public Utility Board ads. Fullerton & Co.....	677
Public Utility Board ads. Fuller's Express Co.....	694
Public Utility Board ads. Meyer.....	694
Public Utility Board ads. Morris & Co.....	694
Public Utility Board ads. New York, Susquehanna & Western	
R. R. Co.....	432
Public Utility Board ads. Passaic Water Co.....	714
Public Utility Board ads. Public Service Railway Co.....	715
Public Utility Board ads. Western Union Telegraph Co.....	729

R.

Raab v. Ellison.....	716
Rabinowitz v. Vulcan Insurance Co.....	332
Raphael ads. Eisele & King.....	219
Ray Estate Corporation v. Steelman.....	184
Reed v. Atlantic City & Suburban Gas & Fuel Co.....	231

Riccio ads. State.....	25
Richards ads. More.....	626
Riverside Turn Verein Harmonie v. Paterson.....	717
Rodgers ads. State.....	60
Rogers v. Warrington.....	653
Rose v. Fitzgerald.....	717
Rose ads. Parkview Building & Loan Association.....	614
Ross v. Commissioners of Palisades Interstate Park.....	461
Ross v. Freeholders of Hudson.....	522
Roth & Miller v. Temkin.....	39
Rounsaville v. Central Railroad of New Jersey.....	176
Rowland v. Mercer County Traction Co.....	82
Ruby v. Freeholders of Hudson.....	335
Rushmore ads. Cooney.....	665

S.

Safety Insulated W. & C. Co. v. Common Pleas of Hudson.....	114
Schwarzrock v. Board of Education of Bayonne.....	370
Scully ads. Carson.....	295
Security Trust Co. v. Edwards.....	558, 579
Seglie v. Ackerman.....	118
Serritella ads. State.....	343
Shaw v. Bender.....	147
Shoeffler v. Phillipsburg Horse Car R. R. Co.....	235
Sholes v. Eisner.....	151
Sickler v. Tuckahoe National Bank.....	336
Silver ads. More.....	626
Smith v. Fire Commissioner of Newark.....	719
Smith v. Smith.....	282
Smith ads. Smith.....	282
Society for Establishing Useful Manufactures v. Board of Conservation & Development.....	469
Spada v. Pennsylvania Railroad Co.....	338
Splitdorf Electrical Co. v. King.....	421
Spocidio ads. DuPont De Nemours Co.....	438
Sprotte v. Delaware, Lackawanna & Western R. R. Co.....	720
Stanford ads. State.....	724
Standard Gas Power Corp. v. New England Casualty Co.....	570
Stark v. Fagan.....	187
State v. DiMaria.....	341
State v. Fletcher.....	722
State v. Fish.....	17
State v. Frank.....	78
State v. Hart.....	261
State v. Hoffman.....	338
State v. Hop.....	390
State v. Jefferson.....	507
State v. Johnson.....	21
State v. Lehigh Valley Railroad Co.....	340, 372
State v. Loomis.....	216

State v. Monetti	582
State v. Nones	342
State v. Pullis	377
State v. Riccio	25
State v. Rodgers	60
State v. Serritella	343
State v. Stanford	724
State v. Vreeland	727
State Board of Assessors ads. Suburban Investment Co.....	727
State Board of Dentistry ads. Lowrie.....	54
State Board of Taxes & Assessments ads. Atlantic Coast Electric Railway Co.	353
State Board of Taxes, &c., ads. Long Dock Co.....	701, 702, 703
State Board of Taxes, &c., ads. Mausoleum Builders.....	163
State Board of Taxes, &c., ads. Old Dominion Mining, &c., Co.,	364
Steelman ads. Ray Estate Corporation.....	184
Strauss ads. Van Roden.....	64
Stuart v. Burlington County Farmers' Exchange.....	584
Suburban Investment Co. v. State Board of Assessors.....	727
Superior Realty Co. ads. Burnett.....	660
Swiller v. Home Insurance Co.....	587
Syms v. West Hoboken.....	130

T.

Temkin ads. Roth & Miller.....	39
Thorpe ads. Jersey City.....	520
Title Guaranty & Surety Co. v. Fusco Construction Co.....	630
Townsend ads. Pennsylvania Railroad Co.....	75
Traud ads. Erwin.....	289
Trenton ads. Trenton & Mercer County Traction Corp.....	378
Trenton & Mercer Country Traction Corp. ads. Carton.....	311
Trenton & Mercer County Traction Corp. ads. Trenton.....	378
Trout v. Paul.....	62
Tuckahoe National Bank ads. Sickler.....	336

V.

Van Hoogenstyn v. Delaware, Lackawanna & Western R. R. Co.,	189
Van Roden v. Strauss.....	64
Van Wagenen ads. Freeman.....	358
Verdon ads. Attorney-General.....	494
Vreeland ads. State.....	727
Vulcan Insurance Co. ads. Rabinowitz.....	332

W.

Warrington ads. Rogers.....	653
Weber ads. Breidt Brewery Co.....	641
Western Union Telegraph Co. v. Public Utility Board.....	729
West Hoboken ads. Bauer.....	1
West Hoboken ads. Cahill.....	398

West Hoboken ads. McCarthy.....	398
West Hoboken ads. Syms.....	130
West Jersey Trust Co. v. Philadelphia & Reading Railway Co.,...	730
West Orange ads. Eckert.....	545
Wheaton v. Collins.....	29
Whitaker v. Dumont.....	383
Whitcomb v. Brant.....	245
Whittingham v. Millburn Township.....	344, 348
Wilczynski v. Pennsylvania Railroad Co.....	178
Wildwood & Delaware Bay R. R. Co. ads. Hendee.....	325
Woodbridge v. Keyes.....	67
Woodbridge ads. Martin.....	414

Z.

Zabriskie v. Edwards.....	731
---------------------------	-----

TABLE OF CASES CITED

IN THIS VOLUME.

A.

Ackerman v. Nutley.....	70 N. J. L. 438.....	160
Ackerson v. Erie Railroad Co.....	31 N. J. L. 309.....	141
Adcock v. Oregon R. & N. Co.....	77 Pac. 78.....	200
Adler v. Turnbull & Co.....	57 N. J. L. 62.....	393
Agricultural Insurance Co. v. Potts,	55 N. J. L. 158.....	543, 585
Albright v. Sussex County Lake Commission	71 N. J. L. 309.....	514
Allen v. City of Millville.....	87 N. J. L. 356; 88 Id. 693..	455
Alleyne's Case	Dears. Cr. Cas. Res. 505....	263
Alsup v. Banks.....	13 L. R. A. 598.....	251
American Malleables Co. v. Bloom- field	83 N. J. L. 728.....	574
American Woolen Co. v. Edwards,	90 N. J. L. 69.....	293, 331, 365
Ames v. Kirby.....	71 N. J. L. 442.....	80
Amparo Mining Co. v. Fidelity Trust Co.	74 N. J. Eq. 197; 75 Id. 555	564
Anderson v. Camden.....	58 N. J. L. 515.....	12
— v. Myers.....	77 N. J. L. 186.....	425
Arkansas Cattle Co. v. Mann.....	130 U. S. 69.....	199
Armitage v. Essex Construction Co.	87 N. J. L. 134; 88 Id. 640..	279
Atlantic City v. Rollins.....	76 N. J. L. 254.....	61
Augur & Simon, &c., v. East Jersey Water Co.	88 N. J. L. 273.....	681

B.

Bailey v. Cascade Timber Co.....	35 Wash. 295.....	200
— v. De Crespigny.....	L. R. 4 Q. B. 178.....	535
Baldwin v. Thompson.....	70 N. J. L. 447.....	200
Barneget Beach Association v. Busby	44 N. J. L. 627.....	98
Barraciff v. Griscom.....	1 N. J. L. 193.....	133
Bartow v. Erie Railroad Co.....	73 N. J. L. 12.....	586
Batchelor v. Avon-by-the-Sea.....	78 N. J. L. 503.....	214
Beagle v. Lehigh, &c., Coal Co....	82 N. J. L. 707.....	456
Beloit v. Morgan.....	7 Wall. 619.....	145
Belt v. Lawes.....	12 Q. B. D. (1884) 356....	199
Benjamin v. Storr.....	19 E. R. C. 263.....	204
Bennett v. Busch.....	75 N. J. L. 240.....	712
— v. Ives.....	30 Conn. 329.....	244
— v. Van Riper.....	47 N. J. Eq. 563.....	636

Berry v. Chamberlain.....	53 N. J. L. 463.....	393
Bigelow v. Perth Amboy.....	25 N. J. L. 297.....	552
Bird v. Magowan.....	43 Atl. Rep. 278.....	233
Blake v. Domestic Mfg. Co.....	64 N. J. Eq. 480.....	279
Blue v. Everett.....	55 N. J. Eq. 329.....	287, 544
Board of Health v. Cattell.....	73 N. J. L. 516.....	56
Bocchino v. Cook.....	67 N. J. L. 467.....	244
Bonnell v. Foulke.....	2 Sid. 4.....	249
Bonynge v. Frank.....	89 N. J. L. 239.....	425
Bork v. United New Jersey Rail- road and Canal Co.....	70 N. J. L. 268.....	655
Bostwick v. Willett.....	72 N. J. L. 21.....	587
Bourgeois v. Freeholders of At- lantic	82 N. J. L. 82.....	276, 531
Bowlsby v. Speer.....	31 N. J. L. 351.....	624
Boylan v. Newark.....	58 N. J. L. 133.....	402
Brewer v. Elizabeth.....	66 N. J. L. 547.....	214
Brewing Improvement Co. v. Board of Assessors	65 N. J. L. 466.....	73, 366
Brewster v. Sussex Railroad Co... — v. Vail.....	40 N. J. L. 57..... 20 N. J. L. 56.....	160 583
Bridgeton v. Fidelity Company... — v. Traction Co.....	88 N. J. L. 645..... 62 N. J. L. 592.....	585 534
Bright v. Platt.....	32 N. J. Eq. 362.....	84
Brine v. Hartford Insurance Co... Broadway Bank v. McElrath.....	96 U. S. 627..... 13 N. J. Eq. 24.....	286 562
Brown v. Atlantic City..... — v. Atlantic City..... — v. Erie Railroad Co.....	71 N. J. L. 81..... 72 N. J. L. 207..... 87 N. J. L. 487.....	101 101 212, 460
Brown v. New Jersey Short Line Railroad Co.	76 N. J. L. 795.....	464
Brown v. State..... — v. Union.....	62 N. J. L. 666..... 65 N. J. L. 601.....	374 214
Buchanan v. Buchanan..... — v. Tilden.....	73 N. J. Eq. 544..... 18 App. Div. (N. Y.) 123..	488 43
Budd v. Camden..... — v. Hiler.....	69 N. J. L. 193..... 27 N. J. L. 43.....	108 200
Bullock v. Biggs.....	78 N. J. L. 63.....	310
Burrough v. New Jersey Gas Co... Butterhof v. Butterhof.....	88 N. J. L. 643..... 84 N. J. L. 285.....	466 205
Byam v. Bullard.....	1 Curt. 101.....	250

C.

Cahill v. Eastman.....	18 Minn. 324.....	622
Camden v. Public Service Railway Co.	82 N. J. L. 246.....	534
Carew v. Rutherford.....	106 Mass. 1.....	244
Carey v. Wolf & Co.....	72 N. J. L. 510.....	543, 585
Carr v. Edwards..... — v. Pennsylvania Railroad Co., 293, 321, 326, 327, 329, 330, 338	84 N. J. L. 667..... 88 N. J. L. 235.....	564
Carson v. Scully.....	89 N. J. L. 458.....	121, 295

Carter v. Executors of Denman...	23 N. J. L. 260.....	287
Caruso v. Montclair.....	90 N. J. L. 355.....	313
Cashman v. New York, New Haven & Hartford Railroad Co.....	87 N. E. Rep. 570.....	316
Castner v. Sliker.....	33 N. J. L. 507.....	314
Caswell v. Worth.....	5 E. & B. 849.....	250
Cavanaugh v. Essex County.....	58 N. J. L. 531.....	523
Cemetery Co. v. Newark.....	50 N. J. L. 66.....	363
Central Railroad Co. v. MacCart- ney	68 N. J. L. 165.....	76
Chandler v. Monmouth Bank.....	9 N. J. L. 101.....	191
Chicago City R. Co. v. Gemmill...	209 Ill. 638.....	199
Ciesmelewski v. Domalewski.....	90 N. J. L. 34.....	351
City Bank of Bayonne v. O'Mara..	88 N. J. L. 499.....	66, 393
City of Paterson v. Baker.....	51 N. J. Eq. 49.....	144
Civil Service Commission v. O'Neill,	85 N. J. L. 92.....	425
Clark v. City of Washington.....	12 Wheat. 40.....	279
Clay v. Civil Service Commission,	88 N. J. L. 502; 89 Id. 194..	426
— v. Edwards.....	84 N. J. L. 221.....	447
Clayton v. Clark.....	55 N. J. L. 539.....	239
Coggs v. Bernard.....	2 Id. Raym. 909.....	561
Cook v. Manasquan.....	80 N. J. L. 206.....	385
Cole v. Ellwood Power Co.....	216 Pa. St. 283.....	467
Collins v. Langan.....	58 N. J. L. 6.....	160
Columbia Mill Co. v. National Bank of Commerce.....	52 Minn. 224.....	279
Commercial Trust Co. v. Board of Taxation	87 N. J. L. 179.....	174
Commonwealth v. Gouger.....	21 Pa. Super. Ct. 217.....	304
— v. Horsfall.....	213 Mass. 232.....	62
Commonwealth v. Illinois Central Railroad Co.	152 Ky. 320.....	376
Commonwealth v. Rowe.....	112 Ky. 482.....	509
Conover v. Public Service Railway Co.	80 N. J. L. 681.....	290
Conover v. Solomon.....	20 N. J. L. 295.....	583
Consolidated Gas, &c., Co. v. Blanda	80 N. J. L. 104.....	135
Cooper Hospital v. Camden.....	70 N. J. L. 478.....	429
Cortelyou v. Lansing.....	2 Cal. Cas. 200.....	566
Cory v. Freeholders of Somerset...	44 N. J. L. 445.....	276
County v. Borax Company.....	68 N. J. L. 273.....	90
Coykendall v. Robinson.....	39 N. J. L. 98.....	223
Crater v. Binninger.....	33 N. J. L. 513.....	244
Creveling v. DeHart.....	54 N. J. L. 338.....	248
Croasdale v. Quarter Sessions...	88 N. J. L. 506; 89 Id. 711..	495
Cromwell v. Sac County.....	94 U. S. 351.....	144
Crosby v. City of East Orange...	84 N. J. L. 708.....	465
Crossley v. Connolly Co.....	89 N. J. L. 55.....	238
— v. Connolly Co.....	90 N. J. L. 238.....	136
Curley v. Mayor, &c., Jersey City..	83 N. J. L. 760.....	467

D.

Dale v. Pattison.....	234 U. S. 399.....	563
Dallas v. Newell.....	65 N. J. L. 172.....	215
Dallas v. Sea Isle City.....	84 N. J. L. 679.....	551
Danskin v. Pennsylvania Railroad Co.	83 N. J. L. 522.....	400
Dederick v. Central Railroad Co....	74 N. J. L. 424.....	545
Defiance Fruit Co. v. Fox.....	76 N. J. L. 482.....	190, 493
DeGray v. Murray.....	69 N. J. L. 458.....	480
Delaware, Lackawanna & Western Railroad Co. v. Board of Public Utility Commissioners	85 N. J. L. 28.....	37
Delaware, &c., Railroad Co. v. Shelton	55 N. J. L. 342.....	282
Delaware, Lackawanna & Western R. R. Co. v. Trautwein.....	52 N. J. L. 169.....	140
Delaware River Transportation Co. v. Trenton	86 N. J. L. 48; Id. 679....	45
Demars v. Koehler.....	62 N. J. L. 203.....	287
DeMateo v. Perano.....	80 N. J. L. 437.....	200
Demster v. Frech.....	51 N. J. L. 501.....	215
Den, ex dem. Lee, v. Evaul.....	1 N. J. L. 286.....	583
Den v. Pond.....	1 N. J. L. 379.....	583
— v. Schenck.....	8 N. J. L. 29.....	609
Dennery v. Great Atlantic & Pacific Tea Co.....	82 N. J. L. 517.....	587
Dennis v. Miller.....	68 N. J. L. 320.....	247
De Raismes v. De Raismes.....	70 N. J. L. 15.....	12
Devlin v. Wilson.....	88 N. J. L. 180.....	517
Dewey v. Great Lakes Coal Co....	236 Pa. St. 498.....	467
Dickinson v. Erie Railroad Co....	85 N. J. L. 586.....	150, 712
Dixon v. Russell.....	79 N. J. L. 490.....	564
Doane v. Millville Insurance Co....	45 N. J. Eq. 274.....	628
Dobkin v. Dittmers.....	76 N. J. L. 235.....	351
Dodd v. Una.....	40 N. J. Eq. 672.....	498
Donald v. Suckling.....	L. R. 1 Q. B. 585.....	562
Donnell v. Wyckoff.....	49 N. J. L. 48.....	562
Donnelly v. Currie Hardware Co.,	65 N. J. L. 388.....	381
Dordoni v. Hughes.....	83 N. J. L. 355.....	648
Douglass v. Freeholders of Essex..	38 N. J. L. 214.....	310
Drummond's Executor v. Drummond	26 N. J. Eq. 234.....	610
Dunham v. Bright.....	85 N. J. L. 391.....	425
Dunnewald v. Henry Steers, Inc....	89 N. J. L. 601.....	659
Durkin v. Fire Commissioners of Newark	89 N. J. L. 468....670, 674, 719	

E.

Eames v. Stiles.....	31 N. J. L. 490.....	213, 493
Earle v. Consolidated Traction Co.,	64 N. J. L. 573.....	290
— v. Durham.....	89 N. J. L. 4.....	317, 319
East Jersey Water Co. v. Bigelow,	60 N. J. L. 201.....	586

Easton & Amboy Railroad Co. v. Greenwich	25 N. J. Eq. 565.....	85
East Orange v. Hussey.....	70 N. J. L. 244.....	66, 190
Eberling v. Mutillod.....	90 N. J. L. 478.....	706
Eggert v. McHose.....	80 N. J. L. 101.....	393
Elizabeth v. Meeker.....	45 N. J. L. 157.....	214
Elvins v. Delaware, &c., Tel. Co....	63 N. J. L. 243.....	464
Emanuel v. McNeil.....	87 N. J. L. 499.....	302
Erie Railroad Co. v. Board of Public Utility Commissioners.....	89 N. J. L. 57.....	434, 672, 673
Erie Railroad Co. v. Paterson.....	72 N. J. L. 83.....	363
Erie Railroad Co. v. Public Utility Board	87 N. J. L. 438.....	271
Erie Railroad Co. v. Wanague Lumber Co.	75 N. J. L. 878.....	78
Erie Railroad Co. v. Welsh.....	242 U. S. 303.....	530
— — — — — v. Winfield....	88 N. J. L. 619; 244 U. S. 170	451, 659, 713, 730
Erwin v. Jersey City.....	60 N. J. L. 141.....	523
Ex parte Barker.....	7 Cow. 143.....	264
— — — — — Fisk.....	113 U. S. 713.....	504
Exton v. Central Railroad Co....	62 N. J. L. 7; 63 Id. 356...	140, 388

F.

Fagan v. Cadmus.....	46 N. J. L. 441; 47 Id. 549..	287
Fairfield v. County of Gallatin....	100 U. S. 47.....	369
Faist v. Hoboken.....	72 N. J. L. 361.....	412
Feeney v. Bardsley.....	66 N. J. L. 239.....	196
Fennen v. Atlantic City.....	88 N. J. L. 435.....	674, 675, 676, 677
Ferguson v. Central Railroad Co.,	71 N. J. L. 647.....	141
Fernetti v. West Jersey, &c., Railroad Co.	87 N. J. L. 268.....	460
Ferretti v. Atlantic City.....	70 N. J. L. 489.....	101
Fifth Ward Savings Bank v. First National Bank	48 N. J. L. 513.....	278
Fitzgerald v. Salentine.....	10 Met. 436.....	89
Flanigan v. Guggenheim Smelting Co.	63 N. J. L. 647.....	202, 706
Fletcher v. Rylands.....	L. R. 1 Ex. 265.....	621
Florence Mining Co. v. Brown....	124 U. S. 385.....	628
Fonsler v. Atlantic City.....	70 N. J. L. 125.....	101
Fort v. Common Pleas.....	89 N. J. L. 144.....	98
Foster v. United States.....	101 C. C. A. 485.....	233
Fowle v. Freeman.....	9 Ves. 351.....	382
Frank et al. v. Herold.....	64 N. J. Eq. 371.....	499
Fredericks v. Board of Health....	82 N. J. L. 200.....	523
Freeholders of Sussex v. Strader..	18 N. J. L. 108.....	619
Freeman v. United States.....	217 U. S. 539.....	57
French v. Robb.....	67 N. J. L. 260.....	654
Friedman v. North Hudson County Railway Co.	65 N. J. L. 298.....	282

Fritts v. Kuhle.....	51 N. J. L. 191.....	12
Fry v. Miles.....	71 N. J. L. 293.....	250
Funck v. Smith.....	46 N. J. L. 484.....	504

G.

Gallagher v. McBride.....	66 N. J. L. 360.....	543
Gannon v. Hargadon.....	10 Allen 106.....	623
Gardner v. Inhabitants of Brook- line	127 Mass. 358.....	467
Gerisch v. Herold.....	82 N. J. L. 605.....	197
Ghegan v. Young.....	23 Pa. St. 18.....	247
Gibson v. Snow Hardware Co....	94 Ala. 346.....	278
Gillespie v. J. W. Ferguson Co....	78 N. J. L. 470.....	146
Godfrey v. Freeholders of Atlantic,	89 N. J. L. 511.....	517
Gorham v. Gross.....	125 Mass. 232.....	622
Gould v. Oliver.....	4 B. N. C. 134.....	250
Grant v. Grant.....	84 N. J. Eq. 81.....	156
— v. Wood.....	21 N. J. L. 292.....	76
Gratz v. Wilson.....	6 N. J. L. 419.....	583
Gray v. Bridge.....	11 Pick. 188.....	493
Gregory v. New York, Lake Erie & Western Railroad Co.....	40 N. J. Eq. 38.....	565
Green v. City of Cape May.....	41 N. J. L. 45.....	277
Greenfield v. Cary.....	70 N. J. L. 613.....	34, 351
Griffin v. Griffin.....	18 N. J. Eq. 104.....	286
Groves v. Cox.....	40 N. J. L. 40.....	610
Guarraia v. Metropolitan Life Ins. Co.	90 N. J. L. 682.....	685
Gulick v. Loder.....	13 N. J. L. 68.....	287, 544

H.

Hackettstown v. Swackhammer...	37 N. J. L. 191.....	550
Hadley v. Freeholders of Passaic..	73 N. J. L. 197.....	467
Haight v. Love.....	39 N. J. L. 14.....	425
Hallock v. Insurance Company...	26 N. J. L. 268; 27 Id. 645..	580
Halsey v. Lehigh Valley Railroad Co.	45 N. J. L. 26.....	542
Hamilton Twp. v. Mercer County Traction Co.	88 N. J. L. 485.....	531
Handford v. Duchastel.....	87 N. J. L. 205.....	493
Hannon v. Boston Railroad Co....	65 N. E. Rep. 809.....	316
Hansen v. DeVita.....	76 N. J. L. 330.....	475
Hardin v. Morgan.....	70 N. J. L. 484; 71 Id. 342..	73, 366
Harmon v. Board of Pharmacy...	67 N. J. L. 117.....	440
Harrington's Sons Co. v. Jersey City	78 N. J. L. 610.....	412
Harris v. Atlantic City.....	73 N. J. L. 251.....	101
Hartshorn v. Cleveland.....	52 N. J. L. 473; 54 Id. 391..	287
Haslack v. Mayers.....	26 N. J. L. 284.....	250
Hasselbusch v. Mohmking.....	76 N. J. L. 691.....	287

Hatfield v. Central Railroad Co...	33 N. J. L. 251.....	160
Haulenbeck v. Cronkright.....	23 N. J. Eq. 407; 25 Id. 513,	465
Heller v. Duff.....	62 N. J. L. 101.....	18
Hendee v. Wildwood & Delaware Bay R. R. Co.....	89 N. J. L. 32.....	325
Hendrickson v. Public Service Rail- way Co.	87 N. J. L. 366.....	667
Herbert v. Atlantic City.....	87 N. J. L. 98.....	112
Herbert v. Mechanics Building & Loan Association.....	17 N. J. L. 497.....	563
Herr v. Board of Education.....	82 N. J. L. 610.....	84
Hershenstein v. Hahn.....	77 N. J. L. 39.....	393
Hetzel v. Wasson Piston Ring Co.,	89 N. J. L. 205.....	640
Heyder v. Excelsior Building and Loan Association.....	42 N. J. Eq. 403.....	616
Hill Dredging Co. v. Ventnor City,	77 N. J. Eq. 467.....	551
Hinds v. Henry.....	36 N. J. L. 328.....	360
Hoboken v. Gear.....	27 N. J. L. 265.....	523
Hoboken Land and Improvement Co. v. Mayor, &c., of Hoboken..	36 N. J. L. 540.....	654
Hohenstatt v. Bridgeton.....	62 N. J. L. 169.....	72, 409
Holmes v. Pennsylvania Railroad Co.	74 N. J. L. 469.....	460
Hooper v. Accidental Death Insur- ance Co.	5 Hulst. & N. 546.....	599
Hopewell v. Flemington.....	69 N. J. L. 597.....	108
Hopper v. Edwards.....	88 N. J. L. 471.....	564
Horandt v. Central Railroad Co...	81 N. J. L. 488.....	460
Horner v. Lawrence.....	37 N. J. L. 46.....	244
Houman v. Schulster.....	60 N. J. L. 132.....	98
Howe v. Northern Railroad Co...	78 N. J. L. 683.....	460
Howe v. Treasurer of Plainfield..	37 N. J. L. 145.....	61
Huebner v. Erie Railroad Co....	69 N. J. L. 327.....	543
Hulley v. Moosbrugger.....	88 N. J. L. 161.....	230, 453
Hunt v. Gardner.....	39 N. J. L. 530.....	247

I.

Illinois Central Railroad Co. v. Peery	242 U. S. 292.....	530
Ingersoll v. English.....	66 N. J. L. 463.....	487
Ingraham v. Weidler.....	139 Cal. 588.....	200
In re Ames' Estate.....	141 N. Y. Supp. 793.....	561
— — Barre Water Co.....	62 Vt. 29.....	132
— — Cheeseman	49 N. J. L. 115.....	497
— — Commissioners of Trenton..	17 N. J. L. J. 23.....	418
— — Penfold's Estate.....	216 N. Y. 171.....	569
— — Verdon	89 N. J. L. 16.....	494
— — Walsh's Estate.....	80 N. J. Eq. 565.....	145
In the matter of Whiting.....	150 N. Y. 27.....	567
Island Heights and Seaside Park Bridge Co. v. Brooks and Brooks,	88 N. J. L. 613.....	310
Izer v. State.....	77 Md. 110.....	583

J.

Jackson v. State.....	49 N. J. L. 252.....	374
—— v. Traction Co.....	59 N. J. L. 25.....	200
Jacobson v. Hayday.....	83 N. J. L. 537.....	654
Jaqui v. Benjamin.....	80 N. J. L. 10.....	286
Jennings v. Rundall.....	8 Term Rep. 335.....	33
Jersey City v. Harrison.....	71 N. J. L. 69; 72 Id. 185..	279
—— v. Montville.....	84 N. J. L. 43; 85 Id. 372..	72
Jersey City v. North Jersey Street Railway Co.	72 N. J. L. 383.....	693
Jersey City Supply Co. v. Jersey City	71 N. J. L. 631.....	275
Jessup v. Bamford Brothers Co...	66 N. J. L. 641.....	623
Johannes v. Phoenix Insurance Co. of Brooklyn	66 Wis. 50.....	120
Johanson v. Atlantic City Railroad Co.	73 N. J. L. 767.....	655
Johnson v. Shields.....	25 N. J. L. 116.....	149
—— v. State.....	59 N. J. L. 535.....	514
—— v. Van Horn.....	45 N. J. L. 136.....	409
Jones v. Mount Holly Water Co...	87 N. J. L. 108.....	543
—— v. Rushmore.....	67 N. J. L. 157.....	247

K.

Kargman v. Carlo.....	85 N. J. L. 632.....	313
Kearns v. Edwards.....	28 Atl. Rep. 723.....	120
Keeney v. Delaware, Lackawanna & Western Railroad Co.....	87 N. J. L. 505.....	713
Kehoe v. Rutherford.....	74 N. J. L. 659.....	208
—— v. Rutherford.....	56 N. J. L. 23.....	577
Kells Mill and Lumber Co. v. Pennsylvania Railroad Co.....	89 N. J. L. 490.....	325
Kelly v. Arbuckle.....	78 N. J. L. 94.....	526
Key v. Paul.....	61 N. J. L. 133.....	190
King v. Archbishop of York.....	Willes Rep. 533.....	262
—— v. Atlantic City Gas Co....	70 N. J. L. 679.....	543
—— v. Hodgson et al.....	1 Leach Cr. Cas. 6.....	263
King v. The Inhabitants of Pres- ton	Rep. Temp. Hardw. 249....	262
Kinney, Admr., v. Central Railroad Co.	34 N. J. L. 273.....	349
Kirby v. Garrison.....	21 N. J. L. 179.....	157
Klemm v. Newark.....	61 N. J. L. 112.....	551
Klitch v. Betts.....	89 N. J. L. 348.....	633, 662
Kloepfing v. Stellmacher.....	36 N. J. L. 176.....	90
Knight v. Cape May Sand Co....	83 N. J. L. 597.....	493
Koetegen v. Paterson.....	90 N. J. L. 698.....	669

L.

Laing v. United New Jersey Railroad, &c., Co.....	54 N. J. L. 576.....	465
Landry v. New Orleans Shipwright Co.	112 La. 515.....	200
Lane v. Otis.....	68 N. J. L. 656.....	515
Laragay v. East Jersey Pipe Co..	77 N. J. L. 516.....	182
Larned v. MacCarthy.....	85 N. J. L. 589.....	480, 706
Lawrence v. Union Insurance Co..	80 N. J. L. 133.....	574
Lawson v. Carson.....	50 N. J. Eq. 370.....	616
Leeds v. Altreuter.....	84 N. J. L. 722.....	99
Lehigh, &c., Co. v. Stevens Co....	63 N. J. Eq. 107.....	628
Lewis v. Pennsylvania Railroad Co.	76 N. J. L. 220.....	159
Lightcap v. Lehigh Valley Railroad	87 N. J. L. 64.....	624
Lindley et al. v. Keim et al.	54 N. J. Eq. 418.....	361
Livermore v. Board of Freeholders of Camden.....	31 N. J. L. 507.....	133
Lloyd v. Hough.....	1 How. 153.....	249
Lomerson v. Johnston.....	47 N. J. Eq. 312.....	170
Long Dock Co. v. State Board of Assessors	89 N. J. L. 108.....	466, 701, 702, 703
Louisville & Nashville, &c., Railroad Co. v. Motley.....	219 U. S. 467.....	535
Louisville & Nashville Railroad Co. v. Parker	242 U. S. 13.....	452, 530
Losee v. Buchanan.....	51 N. Y. 476.....	622
Loweree v. Newark.....	38 N. J. L. 151.....	215
Luther v. Clay.....	39 L. R. A. (Ga.) 95.....	543

Mc.

McCormack v. Williams.....	88 N. J. L. 170.....	713
McCoy v. Milbury.....	87 N. J. L. 697.....	578
McCracken v. Richardson.....	46 N. J. L. 50.....	90
McCrea v. Yule.....	68 N. J. L. 465.....	563
McCurdy v. McCurdy.....	197 Mass. 248.....	569
McGovern v. Board of Works....	57 N. J. L. 580.....	413
McLaughlin v. Cross.....	68 N. J. L. 599.....	602
McLean v. Erie Railroad Co.....	69 N. J. L. 57; 70 Id. 337..	460
McMichael v. Barefoot.....	85 N. J. Eq. 139.....	143

M.

Mabon v. Halstead.....	39 N. J. L. 640.....	96
Mackinson v. Conlon.....	55 N. J. L. 564.....	197
MacLear v. Newark.....	77 N. J. L. 712.....	551
Maguth v. Freeholders of Passaic,	72 N. J. L. 226.....	619
Manahan v. Watts.....	64 N. J. L. 464.....	516
Manda v. City of East Orange....	82 N. J. L. 686.....	467

Manda v. Delaware, Lackawanna & Western Railroad Co.....	89 N. J. L. 327.....	464
Marble v. Ross.....	124 Mass. 44.....	481
Marshall v. Wellwood.....	38 N. J. L. 339.....	622
Materka v. Erie Railroad Co.....	88 N. J. L. 372.....	458
Matthews v. Delaware, Lackawanna & Western Railroad Co..	56 N. J. L. 34.....	681
Mausoleum Builders v. State Board	88 N. J. L. 592; 90 Id. 163..	163, 429
Maxwell v. Edwards.....	89 N. J. L. 446.....	580, 707
May v. West Jersey, &c., Railroad Co.	62 N. J. L. 67.....	200
Mechanics' Building & Loan Association v. Conover.....	14 N. J. Eq. 219.....	563
Meehan v. Excise Commissioners..	73 N. J. L. 382.....	304
Meeker v. Spaulsbury.....	66 N. J. L. 60.....	247
Mehrhof v. Delaware, Lackawanna & Western Railroad Co.....	51 N. J. L. 56.....	204
Meisel v. Merchants National Bank	85 N. J. L. 253.....	563
Melick v. Metropolitan Life Insurance Co.	84 N. J. L. 437; 85 Id. 727..	647
Meliski v. Sloan.....	47 N. J. L. 82.....	154
Memphis, &c., Railroad Co. v. Commissioners	112 U. S. 609.....	164
Mercantile Bank v. Tennessee....	161 U. S. 161.....	164
Metzger v. Huntington.....	139 Ind. 501.....	278
Meyer v. State.....	41 N. J. L. 6.....	62
Miller v. Delaware Transportation Co.	85 N. J. L. 700.....	313
Miller v. Morristown.....	47 N. J. Eq. 62; 48 Id. 645..	207
Minneapolis & St. Louis Railroad Co. v. Winters.....	242 U. S. 353.....	530
Mitchell v. Erie Railroad Co.....	70 N. J. L. 181.....	493
Monmouth Park Association v. Wallis Iron Works.....	55 N. J. L. 132.....	195
Moore v. Camden, &c., Railway Co.	73 N. J. L. 599.....	655
Moran v. Jersey City.....	58 N. J. L. 653.....	213
Mores v. Conham.....	Owen 123.....	561
Morgan v. Louisiana.....	93 U. S. 217.....	164
Moriarity v. Orange.....	89 N. J. L. 385.....	328
Morrell v. Preiskel.....	74 Atl. Rep. 994.....	466
Morris v. Joyce.....	63 N. J. Eq. 549.....	279
—— v. Quick.....	45 N. J. L. 308.....	602
Morris and Essex Railroad Co. v. Central Railroad Co.....	31 N. J. L. 205.....	86
Morwitz v. Atlantic City.....	73 N. J. L. 254.....	101
Mount Pleasant Cemetery v. Newark	89 N. J. L. 255.....	430
Moses v. Macferlan.....	2 Burr. 1005.....	249
Mundy v. Fountain.....	76 N. J. L. 701.....	471

Murphy v. Cane.....	82 N. J. L. 557.....	278
Mutual Benefit Life Ins. Co. v. Rowand	26 N. J. Eq. 389; 27 Id. 604	90
Mygatt v. Coe.....	63 N. J. L. 510.....	89

N

National Docks Co. v. United Com- panies	53 N. J. L. 217.....	84
National Papeterie Co. v. Kinsey..	54 N. J. L. 29.....	601
National Railway Co. v. E. & A. Railroad Co.	36 N. J. L. 181.....	84
Neilson v. Russell.....	76 N. J. L. 27; Id. 655..12,	564
Nevich v. Delaware, &c., Railroad Co.	90 N. J. L. 228.....	453
Newark v. Clinton.....	49 N. J. L. 370.....	693
—— v. Kazinski.....	86 N. J. L. 59.....	521, 671
—— v. Lyons.....	53 N. J. L. 632.....	402
Newark v. New Jersey Asphalt Co.	83 N. J. L. 458.....	197
Newark v. North Jersey Street Railway Co.	73 N. J. L. 265.....	534
New Brunswick v. McCann.....	74 N. J. L. 171.....	671
Newell v. Clark.....	46 N. J. L. 363.....	200
New Jersey v. Anderson.....	203 U. S. 483.....	294, 369
New Jersey Car Spring Co. v. Jer- sey City	64 N. J. L. 544.....	275
New Jersey Flax Cotton Wool Co. v. Mills	26 N. J. L. 60.....	200
New Jersey Zinc Co. v. Lehigh Zinc Co.	59 N. J. L. 189.....	464
Newman v. Fowler.....	37 N. J. L. 89.....	681
Newmann v. Hoboken.....	82 N. J. L. 275.....	699
New York Bay Railroad Co. v. Newark	82 N. J. L. 591.....	363
New York Central Railroad Co. v. Carr	238 U. S. 260.....	452, 530
New York and New Jersey Water Co. v. Hendrickson.....	88 N. J. L. 595.....	365, 537
New York, Susquehanna & West- ern Railroad Co. v. Paterson...	86 N. J. L. 101.....	551
Nichols v. Marshland.....	2 Ex. D. 1.....	622
Norfolk, &c., Railway Co. v. Davis,	58 W. Va. 620.....	467
Northern Pacific Railway Co. v. Meese	239 U. S. 614.....	369
Noxon v. Remington.....	61 Atl. Rep. 963.....	199

O.

Ocean Castle v. Smith.....	58 N. J. L. 545.....	227
----------------------------	----------------------	-----

P.

Packard v. Bergen Neck Railway Co.	54 N. J. L. 553.....	468
Paddock v. Hudson Tax Board...	82 N. J. L. 360.....	402
Parisen v. New York, &c., Railroad Co.	65 N. J. L. 413.....	287
Park Land Corporation v. Mayor, &c., of Baltimore.....	98 Atl. Rep. 157.....	466
Paterson v. Madden.....	54 N. J. Eq. 714.....	606
Paterson and Passaic Gas Co. v. Board of Assessors.....	69 N. J. L. 116.....	354
Patterson v. Close.....	84 N. J. L. 319.....	320
Payne v. Hall.....	82 N. J. L. 362.....	247
Penn Coal Co. v. Sanderson.....	113 Pa. St. 126.....	623
Pennsylvania, New Jersey and New York Railroad Co. v. Schwarz..	75 N. J. L. 801.....	466
Pennsylvania Railroad Co. v. Herrmann	89 N. J. L. 582.....	37
Pennsylvania Railroad Co. v. Root, — v. Titus, 156 App. Div. 830.....	53 N. J. L. 253.....	465
Pennsylvania T. & T. R. R. Co. v. Hendrickson	87 N. J. L. 239.....	59
People v. Corning.....	2 N. Y. 9.....	268
— v. Darragh.....	126 N. Y. Supp. 522.....	62
People v. Globe Mutual Insurance Co.	91 N. Y. 174.....	628
People v. Holbrook.....	13 Johns. 90.....	264
People v. Rochester Railway & Light Co.	195 N. Y. 102.....	375
People v. Sturtevant.....	9 N. Y. 263.....	504
— v. Vermilyea.....	7 Cow. 108.....	264
Peoples Bank v. Mitchell.....	73 N. Y. 406.....	250
Peoples Bank & Trust Co. v. Passaic County Board of Taxation.	90 N. J. L. 171.....	332
Perry v. Levy.....	87 N. J. L. 670.....	209, 725
Pettinger v. Alpena Cedar Co....	175 Mich. 162.....	279
Poillon v. Rutherford.....	58 N. J. L. 113.....	409
Picard v. East Tennessee, &c., Railroad Co.	130 U. S. 637.....	166
Pipe Line Cases.....	234 U. S. 548.....	539
Piver v. Pennsylvania Railroad Co.	76 N. J. L. 713.....	282
Pleasantville v. Atlantic City Traction Co.	75 N. J. L. 279.....	534
Pool v. Brown.....	89 N. J. L. 314.....	290
Potter v. Board of Public Utility Commissioners	89 N. J. L. 157.....	434
Powe v. State.....	48 N. J. L. 34.....	217, 391
Powers v. Hotel Bond Co.	89 Conn. 143.....	456
Public Service Gas Co. v. Board of Public Utility Commissioners...	84 N. J. L. 463; 87 N. J. L. 581; Id. 597.....	272

Public Service Railway Co. v. Public Utility Board.....	88 N. J. L. 24.....	715
Purdy v. People.....	4 Hill 384.....	299

R.

Raab v. Ellison.....	89 N. J. L. 416.....	716
Rabinowitz v. Hawthorne.....	89 N. J. L. 308.....	291, 586
Rafferty v. Bank of Jersey City..	33 N. J. L. 368.....	200
—— v. Erie Railroad Co.....	66 N. J. L. 444.....	200
Rahway Savings Institution v.		
Rahway	53 N. J. L. 48.....	455
Ranson v. Black.....	54 N. J. L. 446.....	514
Raphael v. Lane.....	56 N. J. L. 108.....	240
Re Pigott	11 Cox. Cr. Cas. 311.....	267
Reading, &c., Railroad Co. v.		
Balthaser	119 Pa. St. 472; 126 Id. 1..	407
Reed v. Camden.....	53 N. J. L. 322.....	257
—— v. Saslaff.....	78 N. J. L. 158.....	101
Reeves v. Ferguson.....	31 N. J. L. 107.....	583
Reg. v. Bernard.....	1 F. & F. Cr. Cas. 240.....	264
Regina v. Chadwick.....	11 Q. B. 205.....	268
Regina v. Great Western Laundry Co.	13 Man. 66.....	376
Regina v. Houston.....	2 Crow. & Dix. 191.....	268
—— v. Mills.....	10 Cl. & F. 534.....	268
Reiman v. Wilkinson, Gaddis & Co.,	88 N. J. L. 383.....	393
Rex v. Wilkes.....	4 Burr. 2527.....	267
Ridgeway v. Wharton.....	6 H. L. Cas. 238.....	381
Riley v. Camden, &c., Railway Co.,	70 N. J. L. 289.....	466
—— v. Trenton.....	51 N. J. L. 498.....	61
Robertson v. Wilcox.....	36 Conn. 426.....	563
Robinson v. Hulick.....	67 N. J. L. 496.....	410
Rosedale Cemetery Co. v. Linden..	73 N. J. L. 421.....	429
Rosenbaum v. Credit System Co....	61 N. J. L. 543.....	629
Rosencrans v. Eatontown.....	80 N. J. L. 227.....	699
Rounsaville v. Central Railroad Co.	87 N. J. L. 371.....	176
Rounsaville v. Central Railroad Co.	90 N. J. L. 176.....	451, 659
Ruane v. Erie Railroad Co.....	83 N. J. L. 423.....	594
Ruby v. Freeholders of Hudson...	88 N. J. L. 481.....	335
Runyon v. Central Railroad Co....	25 N. J. L. 556.....	352
Russell v. Mechanics Realty Co....	88 N. J. L. 532.....	393
Rutherford v. Hudson River Traction Co.	73 N. J. L. 227.....	534
Rutkowsky v. Bozza.....	77 N. J. L. 724.....	12
Ryan v. Flanagan, Administratrix.	38 N. J. L. 161.....	185
—— v. Remmey.....	57 N. J. L. 474.....	579
Ryerson v. Bathgate.....	67 N. J. L. 337.....	254
—— v. Morris Canal Co.....	71 N. J. L. 381.....	340

S.

Safford v. Barber.....	74 N. J. Eq. 352.....	565
St. Louis, &c., Railway Co. v. Car-		
ton Real Estate Co.....	204 Mo. 565.....	467
St. Vincent's Church v. Borough of		
Madison	86 N. J. L. 567.....	156
Salter v. Burk.....	83 N. J. L. 152.....	14
Saunders v. Smith Realty Co.....	84 N. J. L. 276.....	254, 662
Schenck v. Strong.....	4 N. J. L. 87.....	33
Schnatterer v. Bamberger & Co....	81 N. J. L. 558.....	594
Scrieber v. Public Service Railway		
Co.	89 N. J. L. 183.....	488
Seastream v. New Jersey Exhibi-		
tion Co.	72 N. J. Eq. 377.....	495
Seattle, &c., Railroad Co. v. Roeder,	30 Wash. 244.....	467
Security Trust Co. v. Edwards....	89 N. J. L. 396.....	558
Seddel v. Wills.....	20 N. J. L. 223.....	611
Senff v. Edwards.....	85 N. J. L. 67.....	581
Sewell v. Burdick.....	54 L. J. Q. B. 156.....	562
Sexton v. Newark District Tele-		
graph Co.	84 N. J. L. 85.....	230
Seymour v. Goodwin.....	68 N. J. Eq. 189.....	185
Shanks v. Delaware, Lackawanna		
& Western Railroad Co.....	239 U. S. 556.....	452, 530
Share v. Anderson.....	7 Serg. & R. 43.....	287
Shill Rolling Chair Co. v. Atlantic		
City	87 N. J. L. 399.....	698
Siciliano v. Neptune Township....	83 N. J. L. 158.....	699
Simpson v. Jersey City Contracting		
Co.	165 N. Y. 193.....	566
Sir Henry Vane's Case.....	1 Lev. 68.....	262
Skillman v. Baker.....	18 N. J. L. 134.....	157
Slaughter House Cases.....	16 Wall. 36.....	109
Small v. Housman.....	208 N. Y. 115.....	278
Smelting Company v. Commission-		
ers of Inland Revenue.....	65 L. J. Q. B. 513; 66 Id.	
	137	567
Smith v. Corbett.....	59 N. J. L. 584.....	98
— v. Hunt.....	32 R. I. 326.....	247
— v. Newark.....	33 N. J. Eq. 545.....	216
— v. Telephone Co.....	64 N. J. Eq. 770.....	585
— v. Wahl.....	88 N. J. L. 623.....	287
Smith & Bennett v. State.....	41 N. J. L. 370.....	343
Southern Pacific Co. v. Industrial		
Accident Commission	161 Pac. Rep. 1139.....	452
Southern Pacific Co. v. Industrial		
Accident Commission	161 Pac. Rep. 1142.....	452
Sparkman v. Gove.....	44 N. J. L. 252.....	287
Spencer v. Morris.....	67 N. J. L. 500.....	393
Standard Amusement Co. v.		
Champion	76 N. J. L. 771.....	586
Stark v. Fagan.....	89 N. J. L. 29.....	187

— v. Lincoln.....	2 Pick. 267.....	250
Starr v. Camden, &c., Railroad Co.	24 N. J. L. 592.....	654
State v. Anderson.....	40 N. J. L. 224.....	61
— v. Arthur	70 N. J. L. 425.....	464
— v. Blake	35 N. J. L. 208; 36 Id. 442..	102
— v. Bovino	89 N. J. L. 586.....	218
— v. Callahan	77 N. J. L. 685.....	82
— v. Calvin	22 N. J. L. 207.....	22
— v. Campbell	82 Conn. 671.....	62
— v. Codington	80 N. J. L. 496; 82 Id. 728..	378
— v. Davis	72 N. J. L. 345; 73 Id. 680..	304
— v. Di Maria	88 N. J. L. 416.....	341
— v. Erie Railroad Co.....	83 N. J. L. 231; 84 Id. 661..	373
— v. Guild	10 N. J. L. 175.....	285
— v. Hart	88 N. J. L. 48.....	261
— v. Heyer	89 N. J. L. 187.... 139, 145,	150
— v. Howard	32 Vt. 380.....	217
— v. Hummer	73 N. J. L. 714.....	314
— v. Jefferson	88 N. J. L. 447.....	507
— v. Kelly	84 N. J. L. 1.....	391
— v. Kroll	87 N. J. L. 330.....	343
State v. Lehigh Valley Railroad Co.	89 N. J. L. 48; 90 Id. 340,	340, 373
State v. Loomis.....	89 N. J. L. 8.....	216
— v. Lovell	88 N. J. L. 353.....	343
— v. McCarthy	76 N. J. L. 295.....	377
— v. Mandeville	89 N. J. L. 228.....	217
— v. Meyer	65 N. J. L. 233.....	260
State v. Morris and Essex Railroad Co.	23 N. J. L. 360.....	373
State v. Murphy.....	27 N. J. L. 112.....	217
— v. Nones	88 N. J. L. 460.....	342
State v. Passaic County Agricultural Society	54 N. J. L. 260.....	373
State v. Pisaniello.....	88 N. J. L. 262.....	376
— v. Rachman	68 N. J. L. 120.....	339
— v. Randall	53 N. J. L. 485.....	61
— v. Randolph	25 N. J. L. 427.....	59
— v. Reilly	88 N. J. L. 104.....	583
— v. Rickey	10 N. J. L. 83.....	378
— v. Schutte	87 N. J. L. 15; 88 Id. 396..	62
— v. Serritella	89 N. J. L. 127.....	343
— v. Shupe	88 N. J. L. 610..... 145,	521
— v. Tapack	78 N. J. L. 208.....	594
— v. Thomas	65 N. J. L. 598.....	375
— v. Turner	72 N. J. L. 404.....	378
State v. United New Jersey Railroad & Canal Co.....	76 N. J. L. 72.....	74
State v. Vreeland.....	89 N. J. L. 423.....	727
— v. Webber	77 N. J. L. 580.....	391
— v. Wilson	80 N. J. L. 467.....	26

State, <i>Baxter v. Jersey City</i>	36 N. J. L. 188.....	106
State, <i>Evans v. Jersey City</i>	35 N. J. L. 381.....	106
State, <i>Miller v. Love</i>	37 N. J. L. 261.....	362
State, <i>Morris Railroad Co. v. Commissioners</i>	37 N. J. L. 228.....	102
State, <i>Morris & Essex Railroad v. Jersey City</i>	36 N. J. L. 56.....	363
State, <i>Noe v. West Hoboken</i>	37 Atl. Rep. 439.....	108
State, <i>Zabriskie v. Hudson City</i> ..	29 N. J. L. 115.....	108
State Board of Assessors <i>v. Morris and Essex Railroad Co.</i>	49 N. J. L. 193.....	164
State Mutual Building and Loan Association <i>v. Williams</i>	78 N. J. L. 720.....	220
Steffens <i>v. Earle</i>	40 N. J. L. 128.....	643
Stephen <i>v. Camden and Philadelphia Soap Co.</i>	75 N. J. L. 648.....	578
Stevens <i>v. Paterson and Newark Railroad Co.</i>	34 N. J. L. 532.....	204
Stokes <i>v. Hardy</i>	71 N. J. L. 549.....	155
Stout <i>v. Hopping</i>	6 N. J. L. 125.....	583
Strauss <i>v. American Talcum Co.</i> ..	63 N. J. L. 613.....	278
Stuhr <i>v. Curran</i>	44 N. J. L. 181.....	523
Styles <i>v. Long Company</i>	67 N. J. L. 413; 70 Id. 301, 129, 574	
Sullivan <i>v. Browning</i>	67 N. J. Eq. 391.....	624
——— <i>v. McOsker</i>	83 N. J. L. 16; 84 Id. 380..	526
Summerside Bank <i>v. Ramsey</i>	55 N. J. L. 383.....	286
Summit <i>v. Iarusso</i>	87 N. J. L. 403.....	671
Sutherland <i>v. Jersey City</i>	61 N. J. L. 436.....	402
Sypherd <i>v. Myers</i>	80 N. J. L. 321.....	205

T.

Tappam <i>v. Long Branch Commission</i>	59 N. J. L. 371.....	551
Taylor Provision Co. <i>v. Adams Express Co.</i>	72 N. J. L. 220.....	493
Teller <i>v. Boyle</i>	132 Pa. St. 56.....	248
Tenement House Board <i>v. Gruber</i> , ..	79 N. J. L. 257.....	56
Terrone <i>v. Harrison</i>	87 N. J. L. 541.....	10
Thompson <i>v. Board of Education</i> , ..	57 N. J. L. 628.....	371
——— <i>v. Burdsall</i>	4 N. J. L. 173.....	11
Thompson <i>v. Pennsylvania Railroad Co.</i>	51 N. J. L. 42.....	406
Thorp <i>v. Leibrecht</i>	56 N. J. Eq. 499.....	488
The Odessa	A. C. (1915) 52; 1 A. C. (1916) 145	562
Tilford <i>v. Dickinson</i>	79 N. J. L. 302; 81 Id. 576..	568
Tilton <i>v. Common Pleas of Ocean</i> , ..	87 N. J. L. 47.....	98
Tilton <i>v. Pennsylvania Railroad Co.</i>	86 N. J. L. 709.....	712
Timlan <i>v. Dilworth</i>	76 N. J. L. 568.....	664
Titus <i>v. Pennsylvania Railroad Co.</i> , ..	87 N. J. L. 157.....	151

Tompkins v. Schomp.....	45 N. J. L. 488.....	504
Tonsellito v. New York Central and Hudson River Railroad Co.,	87 N. J. L. 651.....	713
Townsend v. Atlantic City.....	72 N. J. L. 474.....	549
Township of Bernards v. Allen...	61 N. J. L. 228.....	71
Traphagen v. West Hoboken.....	39 N. J. L. 232.....	397
Trenton v. Shaw.....	49 N. J. L. 638.....	477
Trenton Pass. Railway Co. v. Cooper	60 N. J. L. 219.....	209
Tri-State Tel., &c., Co. v. Cosgriff,	19 N. D. 771.....	467
Tukey v. Foster.....	158 Iowa 311.....	286
— v. Reinholdt.....	130 N. W. Rep. 727.....	286
Turner v. Wells.....	64 N. J. L. 269.....	196

U.

Uffert v. Vogt.....	65 N. J. L. 377.....	523
---------------------	----------------------	-----

V.

Van Buskirk v. Board of Educa- tion	78 N. J. L. 650.....	195
Vandegrift v. Meihle.....	66 N. J. L. 92.....	583
Van Horn v. Freeholders of Mercer,	83 N. J. L. 239.....	402
Van Ness v. New York, &c., Tel. Co.	78 N. J. L. 511.....	466
Van Ness v. North Jersey Street Railway Co.	77 N. J. L. 551.....	587
Van Noort Case.....	85 Atl. Rep. 813.....	122
Vishney v. Empire Steel & Iron Co.	87 N. J. L. 481.....	555
Vogel v. Piper.....	89 N. Y. Supp. 431.....	248

W.

Waible v. West Jersey, &c., Rail- road Co.	87 N. J. L. 573.....	400
Wakeman v. Paulmier, Executor..	39 N. J. L. 340.....	185
Wall v. Hinds.....	4 Gray 256.....	543
Walnut v. Newton.....	82 N. J. L. 290.....	90
Ward v. Hauck.....	87 N. J. L. 198.....	130
Walsh v. Board of Education of Newark	73 N. J. L. 643.....	464
Warner v. Fourth National Bank,	115 N. Y. 251.....	566
Water Commissioners of Jersey City v. Brown.....	32 N. J. L. 504.....	381
Watt v. Watt.....	L. R. App. Cas. (1905) 115,	199
Weidman Silk Dyeing Co. v. East Jersey Water Co.....	91 Atl. Rep. 338.....	680
Weiss v. Central Railroad Co....	76 N. J. L. 348.....	460
Welch v. Hubschmitt.....	61 N. J. L. 57.....	197
Wentink v. Freeholders of Passaic,	66 N. J. L. 65.....	279, 551
West v. Asbury Park.....	89 N. J. L. 402.....	101
Westfall v. Dunning.....	50 N. J. L. 459.....	393

West Shore Railroad v. Wenner..	75 N. J. L. 494.....	250
West v. State.....	22 N. J. L. 212.....	265
Wharton v. Stoutenburgh.....	35 N. J. Eq. 266.....	382
White v. Koehler.....	70 N. J. L. 526.....	393
White v. Neptune City.....	56 N. J. L. 222.....	56
White v. New York, Susquehanna & Western Railway Co.....	68 N. J. L. 123.....	244
Whitmore v. Brown.....	65 Atl. Rep. 516.....	204
Whittingham v. Township of Mill- burn	90 N. J. L. 344.....	348
Wilbur v. Trenton Passenger Rail- way Co.	57 N. J. L. 212.....	534
Wilson v. New Bedford.....	108 Mass. 261.....	622
—— v. Borden	68 N. J. L. 627.....	577
—— v. Gaines	103 U. S. 417.....	164
Williamson v. Chamberlain.....	10 N. J. Eq. 373.....	607
Wolcott v. Mount.....	36 N. J. L. 262.....	584
Wolf Company v. Fulton Realty Co.	83 N. J. L. 344.....	351
Wright v. Carter.....	27 N. J. L. 76.....	655

Y.

Yetter v. Gloucester Ferry Co....	76 N. J. L. 249.....	140
Young v. Traveller Insurance Co.,	13 Atl. Rep. 896.....	598
—— v. Young	45 N. J. L. 197.....	156

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY.

FEBRUARY TERM, 1917.

FREDERICK E. BAUER, PROSECUTOR, v. TOWN OF WEST
HOBOKEN ET AL., RESPONDENTS.

Argued November 10, 1916—Decided March 5, 1917.

1. The statute of 1911, entitled "An act to authorize any incorporated town in this state to purchase fire engines, or other fire apparatus, equipment and appliances, for protection against fire, and to provide a method for raising money for the payment thereof," as amended March 28th, 1912 (*Pamph. L.*, p. 358), was not intended to curtail the powers conferred by the General Town act (*Pamph. L.* 1895, p. 218) with reference to that subject, but was intended to enlarge such powers, by permitting the issue of bonds where the purchase of fire apparatus was reasonably necessary, but other pressing expenditures made it inadvisable to provide the moneys necessary for the purchase out of the annual tax levies.
2. Where a bid for a municipal contract is open to the world for competition, and everyone has an equal chance of success in obtaining the award, the fact that the successful bidder has no competition cannot operate to deprive the municipality of its right to award the contract.
3. The fact that one particular bidder is able to comply with the specifications for municipal work at less expense than other concerns affords no ground for refusing to the municipality the right to obtain the best material or work that skill and ingenuity can produce.

Bauer v. West Hoboken.

90 N. J. L.

On *certiorari*.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the prosecutor, *Frederick K. Hopkins*.

For the respondents, *John J. Fallon* and *Edwin F. Smith*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The *certiorari* in this case brings up for review an ordinance of the town council of West Hoboken, adopted August 23d, 1916, providing for the purchase of certain fire apparatus, and proceedings subsequent thereto and in execution thereof. The amount proposed to be expended under the ordinance was limited therein to \$17,800, and the payment was to be made out of the taxes assessed and collected for the year 1916.

The principal attack upon the ordinance is that it is *ultra vires* the town council, because in violation of an act approved April 15th, 1911, and entitled "An act to authorize any incorporated town in this state to purchase fire engines, or other fire apparatus, equipment and appliances for protection against fire, and to provide a method for raising money for the payment thereof," as amended March 28th, 1912. *Pamph. L.*, p. 358. This act provides for the purchase of fire engines and other apparatus at a cost not to exceed \$15,000, and the issuing of bonds in that amount to raise the money necessary to pay the purchase price.

In determining the scope of this statute it is to be borne in mind that the power to purchase fire apparatus by the governing bodies of incorporated towns was not originally conferred by it, but by "An act providing for the formation, establishment and government of towns," approved March 7th, 1895 (*Pamph. L.*, p. 218), the forty-seventh section of which authorizes such municipal body "to provide for, establish, regulate and control a fire department, and to establish rules for the government thereof, and to provide engines and

other fire apparatus, and the care and repair" thereof. Section 52 of the act authorizes the town council to pass ordinances appropriating and providing for raising by taxation, moneys for certain specified purposes, among which is "the maintenance of the fire department." The town of West Hoboken was formed and established under this general law, and upon its establishment had full power and authority to pass ordinances for the purposes enacted in the sections just quoted. The statute of 1911, as amended in 1912, was not intended to curtail the powers conferred by the general Town act, but to enlarge them; to permit these municipalities, in cases where the purchase of fire apparatus was reasonably necessary, but other pressing expenditures made it inadvisable to provide the moneys necessary for the purchase thereof out of the annual tax levy, to issue bonds, within the amount limited by the statute, for the raising of money to make such purchase. The two statutes are to be construed together, and each one to be given full force and effect, unless a legislative intent is clearly exhibited in the later act to repeal the provisions of the earlier one. No such intent is exhibited in the statute of 1911. The provision of section 5 thereof, that all acts and parts of acts conflicting or inconsistent therewith "be and the same are hereby repealed," does not do so, because, as we have already pointed out, the two statutes do not conflict with, nor are they inconsistent with each other.

The next ground of attack upon the proceedings under review is that the contract entered into pursuant to the ordinance was invalid, because it was not awarded to the lowest bidder. The return to the writ shows that the contract was duly advertised in accordance with law, with proper specifications, and that the advertisement produced but one bid, that of the American La France Fire Engine Company, the party to whom the contract was awarded. The idea of the prosecutor seems to be that where municipal advertisements calling for bids for the furnishing of supplies to the municipality only produce a response from one bidder, it is illegal to award the contract. But we think there is no foundation for such a contention. Where the bid is open to the world

Bauer v. West Hoboken.90 N. J. L.

for competition, every one having an equal chance of success in obtaining the award, the fact that the successful bidder has no competitors cannot operate to deprive the municipality of its right to purchase. The legislature requires that where there are several bidders the award shall be to the lowest responsible one; but it does not prohibit the city from entering into a contract with the lowest bidder, when he is the only one who has responded to the advertisement. And the reason for this is quite plain, for to put such a limitation upon the power of the municipality might frequently operate to prevent it from promptly obtaining supplies which were presently necessary for the purpose of properly carrying on municipal affairs.

One other ground is set up for the nullifying of the proceeding under review, namely, that the specifications for the fire apparatus were so drawn as to absolutely prohibit competition, for the reason that they described characteristics which were present in the product of the American La France Fire Engine Company, but were absent from the output of any other concern manufacturing fire apparatus. The proof in the case, however, shows that all manufacturers of fire apparatus could readily construct the machines described in the specifications if they saw fit to do so. It may be that the American La France Fire Engine Company is able to construct them at a less expense than other concerns; but, conceding this to be true, it affords no ground for refusing to the town of West Hoboken the right to obtain the very best fire apparatus that skill and ingenuity can produce.

The proceedings under review will be affirmed.

90 N. J. L.Collings v. Allen.

ROBERT Z. COLLINGS, TRUSTEE, RESPONDENT, v. WALTER ALLEN, APPELLANT.

Submitted November 24, 1916—Decided March 5, 1917.

A subscription to the stock of a proposed corporation, to be organized under a specified name and for certain designated purposes, imposes no obligation upon the subscriber to take stock in a company afterward organized by the same promoters under the same corporate name, but for radically different purposes.

On appeal from the Burlington Circuit Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the appellant, *Martin V. Bergen* and *V. Claude Palmer*.

For the respondent, *Joseph Beck Tyler*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This action was brought by Collings, the trustee of "The Ottomobile Company," a corporation of New Jersey, adjudicated a bankrupt by the United States District Court, upon a stock subscription signed by the defendant, of which the following is a copy: "Subscription to preferred stock of the Ottomobile Company, par value \$100 per share. September 25th, 1911. I hereby subscribe to four shares of the par value of \$100 per share of the six per cent. preferred stock of the Ottomobile Company, a corporation to be organized under the laws of the State of New Jersey with an authorized capital of \$250,000, six per cent. preferred, and \$250,000 common stock, one share of common stock to be given as a bonus with each two shares of preferred. The purpose of the organization is to acquire the automobile interests of the Otto Gas Engine Works of

Collings v. Allen.90 N. J. L.

Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Company of Philadelphia. I agree to pay for such stock as follows," and then follows the dates and amounts of the payments.

The case was tried before the court without a jury, and resulted in a finding in favor of the plaintiff for the par value of four shares of the preferred stock, and two shares of the common stock of the bankrupt corporation, with interest upon the same from the date when, according to the finding of the court, the defendant was obligated to take the stock. From the judgment entered on this finding the defendant appeals.

The company of which the plaintiff is the representative was organized under the corporation laws of this state in January, 1912. The principal purposes of its incorporation, as set forth in the certificate filed by it, were to manufacture automobiles, automobile and motor car accessories and supplies of every class and description, including any and all parts of vehicles of all kinds, or any other goods pertaining to the automobile business, or otherwise, which the corporation may determine to manufacture. To buy, sell and deal in automobiles, automobile and motor car accessories and supplies of every class and description as manufacturers, agents, jobbers, wholesale or retail, on commission or consignment or otherwise, including any and all parts of vehicles of all kinds, or any other goods pertaining to the automobile business, or otherwise, in which the corporation may determine to deal. To carry on the business of mechanical engineers, and dealers in and manufacturers of plants, motors, engines, and other machinery. To buy, sell, manufacture and deal in machinery, implements, rolling stock and hardware of all kinds. To build, construct and repair railroads, water, gas and electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like work of internal improvement, public use or utility. To manufacture, purchase, or otherwise acquire goods, merchandise and personal property of every class, and to hold, own, mortgage, sell or otherwise dispose of, trade, deal in and deal with the same. To borrow

or raise money without limit as to amount by the issue of, or upon, warrants, bonds, debentures and other negotiable or transferable instruments, or otherwise.

Other purposes are also specified in the certificate of incorporation; we do not find it necessary, however, to recite them. It is enough to say that the purposes for which the bankrupt corporation was organized are not only far different from, and far more comprehensive, than those for which the proposed company referred to in the defendant's subscription contract was to be organized, but that they do not any of them necessarily embrace either of the two purposes expressed in that contract, namely, the acquisition of the automobile interests of the Otto Gas Engine Works of Philadelphia, and the entire assets and good will of the Otto Motor Car Sales Company of Philadelphia.

The case was decided below, and is argued here on behalf of the respondent, upon the theory that the appellant by signing the subscription contract became a *quasi* stockholder in the proposed company, and that having stood by without protest and permitted the organizers of the now bankrupt corporation to incorporate it for purposes entirely different from those which were originally proposed, he is deemed to have acquiesced in the change, and to be bound by their acts. But, clearly, the position of the appellant was not that of a *quasi* stockholder acquiescing in the proposal of his fellow stockholders to divert his and their moneys to purposes other than those to which they were agreed to be appropriated at the time he signed the subscription. His contract, and that of his fellow subscribers, was to take specified shares in a New Jersey corporation to be thereafter organized, having a specified name, a specified amount of capital stock, and to be created for the purpose of carrying into effect certain specified objects. The name of the intended corporation was, of course, of secondary importance. That it should be organized under the laws of the State of New Jersey, and so be clothed with all the powers, and receive all the protection afforded by those laws, was of primary importance. So, too, was the amount of the capital stock. But even more im-

portant was the purpose to which the moneys of the gentlemen who signed these subscription certificates was to be devoted. They became subscribers upon the express condition that their money should be used for the specific purposes set out in the contract signed by them, and for such ancillary purposes as were necessary or reasonable. They never agreed to embark their money in any such schemes as are exhibited by the certificate of incorporation of the company of which the plaintiff is the trustee, and, consequently, had no interest in the formation of a company to exploit those schemes. Their acquiescence or non-acquiescence in the organization of such a corporation was entirely immaterial, so far as the power of the promoters to create it for the purposes specified in its certificate of incorporation was concerned; and their protest against such action would have been entirely unavailing; for the intended promoters were at perfect liberty to embark their own capital, and the capital of anyone else who desired to join them in floating any scheme which they saw fit to inaugurate, without the let or hindrance of persons who had no interest therein. So, too, they had a right to adopt the name which was proposed for the corporation intended to be organized for the purposes expressed in the subscription contract which the appellant signed; for no right to that name had vested in him and his fellow subscribers, and could not do so until the corporation in which they had expected to invest their money had actually been formed.

The obligation of the defendant and his fellow subscribers is expressed within the four corners of the instrument which is the foundation of the present suit. The fact that the promoters of the intended corporation saw fit to abandon the original purposes thereof, and organize a company the purposes of which were radically different in every respect, could not alter the fundamental contract of Mr. Allen and his associates, and impose upon them an obligation to invest their moneys in the new scheme. We conclude, therefore, that the judgment under review must be reversed.

90 N. J. L.Cook v. Bennett Gravel Co.

PERRINE R. COOK, RESPONDENT, v. BENNETT GRAVEL
COMPANY, APPELLANT.

Submitted December 7, 1916—Decided March 5, 1917.

Under a proper construction of the Timber act (*Comp. Stat.*, p. 5396), a plaintiff in an action for a violation of the provisions of that act is limited in his recovery to the actual loss sustained by him if the wrongful acts complained of have been committed by the defendant under an honest belief that he was cutting timber upon his own property, and the question of whether or not defendant has such belief is a question for the determination of the jury.

On appeal from the Monmouth Circuit Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the appellant, *Durand, Ivins & Carton*.

For the respondent, *Charles F. Dittmar*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The appeal in this case brings up for review a judgment recovered by the plaintiff, Mr. Cook, in an action brought under an act entitled "An act to prevent the unlawful waste and destruction of timber in this state" (*Comp. Stat.*, p. 5396), the complaint being that the defendant had unlawfully cut down one hundred and seventy-three trees growing upon the plaintiff's land, and the claim being that under the statute referred to the plaintiff was entitled to recover from the defendant a penalty of \$8 for each tree so unlawfully cut down. The defence interposed was that the trees which were the subject-matter of the litigation were growing, not upon the property of the plaintiff, but upon that in the ownership of the defendant, and a large amount of testimony was taken on both sides for the purpose of settling the location of the dividing line be-

Cook v. Bennett Gravel Co.30 N. J. L.

tween their respective properties. The trial court instructed the jury that if they should find the trees which had been cut down by the defendant were growing upon the plaintiff's side of the line, then, under the Timber act, he was entitled to recover the penalty prescribed therein, without regard to the amount of damage actually sustained by him through the wrongful act of the defendant.

The only question raised by the present appeal is whether the instruction just recited was sound in law. On behalf of the plaintiff it is contended that it is immaterial in the determination of a right of recovery under the statute, whether the defendant acted in good faith and in an honest belief that it was cutting timber upon its own property, or whether it was guilty of a willful and intentional trespass; while on the other hand, it is argued on behalf of the defendant that where the acts complained of are done in the honest belief by the defendant that he is cutting timber on his own property, the plaintiff's right of recovery is limited to the actual loss sustained by him from the cutting of the timber.

It goes without saying that the soundness of the one contention or the other depends upon the true construction of the Timber act. The history of that statute is set out in the opinion of the Court of Errors and Appeals in the case of *Terrone v. Harrison*, 87 N. J. L. 541. It was originally enacted in 1820. *Penn. Laws* 700. Its first section provides that if any person shall cut down, carry away or destroy any tree, sapling or pole, standing or lying on any land within this state to which said person has not any right and title, without leave first had and obtained of the owner or owners of said land, the person so offending shall forfeit and pay for each tree, &c., so cut down, carried away or destroyed, the sum of \$8. The second section of the statute made the same offence criminal, and punishable by a fine or imprisonment, but contained a proviso that a person who had been subjected to a prosecution for the penalty provided in the first section, should not be subject to conviction and punishment criminally. The third section provided that if any

90 N. J. L.

Cook v. Bennett Gravel Co.

person should saw up any log, or receive or buy any tree, sapling, log or timber so unlawfully taken and carried away, knowing the same to have been so unlawfully taken and carried away, he should be deemed guilty of a misdemeanor and punished by fine or imprisonment. In 1874 the second and third sections of this act were transferred to the Crimes act, but, as was held in *Terrone v. Harrison, supra*, such transfer did not operate to repeal section 1 of the act, but left it in full force and effect. The matter for solution, then, is whether the legislature in 1820 intended that the penalties of the statute then enacted should be visited upon a person who, in good faith, should cut down trees standing upon lands of another, believing that they were upon his own property.

It is to be observed that the same act which by section 1 subjects the perpetrator to a penalty, subjects him by the second section to a criminal prosecution. It is hardly to be supposed that the legislature intended to make criminal an act done in perfect good faith, and under a claim of right fully believed in; and yet such a purpose must be attributed to the lawmaking body if the first section of the statute subjects the unintentional offender to a penalty; for if the element of intent is absent from the first section, it must also be absent from the second.

Moreover, the statute of 1820, although an original enactment, was largely taken from the act of June 13th, 1783. *Pat. L., p. 49*. The first section of the earlier act is adopted almost *verbatim* in the act of 1820, the only difference being that the penalty prescribed is three pounds for each tree, &c., instead of \$8. In 1818, Mr. Justice Southard, speaking for this court in *Thompson v. Burdsall*, 4 N. J. L. 173, declared that this statute only imposed a penalty where the party had no justification for his trespass, and not where he relied upon his title to protect him; and the soundness of this declaration is made manifest by section 2 of the act of 1783, which declared "that if any person or persons shall saw any log or logs so *stolen*, knowing them to be such, they and every person so offending shall on conviction," &c., &c. The

Florey v. Lanning.90 N. J. L.

use of the words italicized makes it plain that it was the intention of the legislature in enacting section 1 to deal with persons who, without any shadow of right, or belief in its existence, tortiously cut down and removed standing timber upon lands not belonging to them.

The first section of the act of 1783 having been embodied in the enactment of 1820, the legislature which passed the later act is to be presumed to have adopted the earlier one with the meaning which had already been ascribed to it by judicial construction. *Fritts v. Kuhle*, 51 N. J. L. 191, 199; *Anderson v. Camden*, 58 Id. 515, 519; *De Raismes v. De Raismes*, 70 Id. 15, 18; *Neilson v. Russell*, 76 Id. 27, 32; *Rutkowsky v. Bozza*, 77 Id. 724, 725.

In the present case it should have been left to the jury to determine whether the wrongful acts complained of were committed by the defendant under an honest belief that it was cutting timber upon its own property, coupled with an instruction that if they should so find the plaintiff's damages should be limited to the actual loss sustained by him through the wrongful act of the defendant.

The judgment under review will be reversed.

HARVEY U. FLOREY, RELATOR, v. LEWIS M. LANNING.
RESPONDENT.

Argued June 6, 1916—Decided March 5, 1917.

1. An appointment to the office of any borough, to fill a vacancy in such office, caused by death, disability, resignation or any other cause, if made for a longer term than until noon of the first day of January following the next annual election, is in violation of section 1 of the amendment of 1904 of the Borough act (*Comp. Stat.*, p. 230), and therefore nugatory.
2. One who complains that the incumbent of an office holds the office illegally, can only succeed in a *quo warranto* proceeding to oust the incumbent, by showing that he himself has a legal title thereto.

90 N. J. L.Florey v. Lanning.

On *quo warranto*. Demurrer to plea.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the demurrant, *Oscar Jeffery*.

For the respondent, *Smith & Brady*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The information in this case was filed for the purpose of having it judicially determined whether the relator or the respondent was entitled to the office of member of common council of the borough of Washington. The material facts are not in dispute. One Isaac J. Shields, a member of the common council, died in February, 1915. Shortly afterward, and on the 2d day of March of that year, the relator Florey, was appointed by the mayor of the borough to succeed the decedent for the unexpired term, and his appointment was confirmed by the borough council. Mr. Shields had been elected for a term which expired on the 1st day of January, 1917. Pursuant to his appointment the relator entered upon the office, and continued in the discharge of the duties thereof until the 1st day of January, 1916. On that day a new mayor, one Harry Christine, having been elected at the preceding November election, assumed that the vacancy created by the death of Mr. Shields still persisted, and thereupon appointed the respondent to fill that vacancy, this appointment also being for the unexpired term of Mr. Shields, and likewise affirmed by the council. In pursuance of this latter appointment the respondent ousted the relator, and continued in the occupation of the office up to and at the time of the filing of the present information. The question argued was which, if either, of these litigants is legally entitled to the office.

By section 1 of the amendment of 1904 to the Borough act (*Comp. Stat.*, p. 230), it is provided that whenever the office of councilman of any borough in the state shall become va-

Florey v. Lanning.

90 N. J. L.

cant by reason of death, disability, resignation or any other cause, it shall be lawful to fill such vacancy by appointment, and the person so appointed shall hold office until noon of the first day of January following the next annual election, and until his successor shall have qualified; and that the mayor shall, with the advice and consent of the majority of the remaining members of the council, appoint the councilman to fill such vacancy as above provided for. It is apparent from a reading of this statutory provision that the mayor of Washington upon the death of Mr. Shields could only appoint to fill the vacancy for a period which should come to an end normally on the first day of January then next. This being so, his attempt to fill the office for the unexpired term of Mr. Shields, that is, for a year longer than the statute authorized him to fill it for, was in direct violation of section 1 of the amendment to the Borough act referred to, and, consequently, was entirely nugatory under the decision of this court in *Salter v. Burk*, 83 N. J. L. 152. The fact that the present relator, Mr. Florey, entered into the office of councilman under this invalid appointment, and assumed to perform its duties, and to receive its emoluments, is immaterial in determining the question now under consideration. It may be conceded that as to the public, and third parties, he was a *de facto* officer; but even so he could not persist in retaining possession of the office to which he had no legal title, against the protest of the municipality itself. As against it, there was in fact a vacancy, unless the incumbent was an officer *de jure*. Admitting that the relator was ousted from the office by a gentleman who had no more right to it than himself, that fact does not entitle him to a judgment against the respondent, for one who complains of the illegality of an incumbent's title to an office can only succeed in a *quo warranto* proceeding by showing that he himself has a legal title thereto. This being so, we are not presently concerned with the validity of the respondent's title, for whether it be good or bad cannot result in entitling the relator to the judgment which he seeks.

The respondent is entitled to judgment on the demurrer.

90 N. J. L.Hammond v. Morrison.

MYRA HAMMOND, ADMINISTRATRIX, PLAINTIFF, v.
JAMES L. MORRISON, DEFENDANT.

Argued November 9, 1916—Decided March 5, 1917.

Where defendant, while driving an automobile on a public highway, ran into plaintiff's decedent because he was unable to see decedent, owing to his temporary blindness caused by the deflection of light shining on his windshield, and there being no contention that acts of the decedent contributed to his injury, a verdict of the jury, on the trial for damages, resulting in the exoneration of the defendant, cannot be justified, and is set aside.

On plaintiff's rule to show cause.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the rule, *Leonard J. Tynan*.

Contra, William I. Lewis.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This action was brought to recover damages growing out of the death of Edwin J. Hammond, resulting from injuries received by being struck by the defendant's automobile. The accident occurred near midnight of February 19th, 1915, at the crossing of Broadway in the city of Paterson with the tracks of the New York, Susquehanna and Western Railroad Company. The decedent was a conductor in the employ of the Public Service Corporation, and at the time of the accident had gone to the rear of his car for the purpose of adjusting the trolley, which had jumped the wire at or about the railway crossing; and, while engaged in this work, was run into by the defendant's automobile, and crushed between it and the rear of the trolley car. The verdict of the jury on the trial of the cause resulted in the exoneration of the defendant.

Hammond v. Morrison.90 N. J. L.

This verdict cannot be justified. The only issue in the case was whether or not decedent's death was the result of the negligence of the defendant, the question of contributory negligence not having been presented by the pleadings. The defendant did not deny that the decedent came to his death in the way above stated, but attempted to excuse himself upon the ground that just before the collision the street lights which he had passed were reflected into his eyes by the windshield of his car, so that he was unable to see in front of him, and that this temporary blindness was the cause of the collision. His own story demonstrates his lack of care. No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his windshield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Having seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being.

We have examined the other reasons set up by the plaintiff in support of her contention that this rule should be made absolute, but find them without merit. The testimony alleged to be incompetent (and which probably was) was not objected to by her, but, on the contrary, went into the case with her consent. The overruling of testimony offered on behalf of the plaintiff was submitted to without objection. The refusal to charge the requests which were submitted by her was not objected to, nor was there any objection made to the charge by the court of the request submitted by the defendant.

The rule to show cause will be made absolute.

90 N. J. L.State v. Fish.

THE STATE, DEFENDANT IN ERROR, v. HARWOOD FISH,
PLAINTIFF IN ERROR.

Submitted July 6, 1916—Decided March 5th, 1917.

1. Printed words circulated, charging a member of the grand jury with malfeasance of the gravest character in his office, if untrue, are libelous.
2. In a trial of an indictment for libel, it is not permissible to introduce testimony in support of the truth of matters contained in the alleged libelous article but which are not referred to in the indictment or made a ground of charge against the defendant, since, even if it be conceded that the charges at which it is directed be true, it can afford no justification for the untruthful statement which is made the subject of the indictment.
3. A witness who has been examined before the grand jury is under no legal obligation to refrain from stating what was said to or by him while there.
4. A person who circulates a paper containing an untruthful and libelous statement is subject to punishment under indictment, no matter what his motives are or what induces his action.
5. An erroneous statement of law by the prosecutor of the pleas in arguing before the jury cannot be made a ground for reversal under section 136 of the Criminal Procedure act, where no application is made to the court to deal with the statement.

On error to the Union Quarter Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *Codding & Oliver*.For the state, *Alfred A. Stein*, prosecutor of the pleas.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The defendant was convicted of the crime of libel. The case made against him was that he had circulated a printed article among certain of the voters of his county in which he stated the following of one William E. Johnson, who had been a member of the Union

county grand jury: "As a member of the grand jury he succeeded in protecting the biggest swindler to my mind that ever struck the county, and although I understand an indictment was voted against his friend, for some unexplained reason it was never handed in."

The first ground upon which we are asked to reverse the conviction is that the indictment did not charge a crime, because the words set out in it are not libelous. This point is almost too tenuous for discussion. The words cited charge a member of the grand jury, the holder of a public office of great importance, with malfeasance in his office of the gravest character. That such a charge, if untrue, is plainly libelous was decided by this court in *Heller v. Duff*, 62 N. J. L. 101.

The next contention is that it was error for the trial court to allow the deputy clerk to read from the record in the clerk's office the names of the members of the grand jury for the May term, 1911, for the purpose of showing that Johnson was a member of that body. This reading was objected to upon the ground that it was immaterial who were the members of the grand jury, except, perhaps, as to William E. Johnson. This objection having been made, the court ruled that the reading was only evidential for the purpose of ascertaining Mr. Johnson's membership. This ruling wiped out the ground of objection, and, consequently, the defendant can take nothing by this contention. We may add that we are unable to see how any harm could have come to the defendant from the reading of this grand jury list, even in the absence of the ruling just referred to.

Next it is urged that the court committed error in excluding testimony offered in support of the truth of other matters contained in the alleged libelous article, but which were not referred to in the indictment, or made a ground of charge against the defendant. We think this testimony was properly excluded, for, if it be conceded that the charges at which it was directed were true in fact, that could not afford any justification for the untruthful statement which is made the subject of the indictment.

Next it is contended that it was erroneous to refuse to permit the defendant to prove matters which had occurred in the grand jury room during the investigation of the charges made against the person who was designated by the defendant as "the biggest swindler that ever struck the county." The offer was to show that facts had been communicated to him by one McDevitt, who had been a witness before the grand jury, that justified him in writing and circulating the libelous article. This testimony was overruled upon the ground that it had a tendency to violate the secrecy of the grand jury room. We do not think this ground of exclusion is sound. A witness who has been examined before a grand jury is under no legal obligation to refrain from stating what was said to and by him while there. The obligation of secrecy rests only upon members of that body, and those associated with them in the administration of justice. But we consider the ruling proper, for the reason that the fundamental question was not what caused the defendant to publish this untruthful charge against Mr. Johnson, but whether it was in fact untruthful. No matter what his motives were, no matter what induced his action, if, in fact, he did circulate the paper, and it contained a libelous and untruthful charge, he is subject to punishment under the indictment.

The next objection is that the court erred in refusing to direct a verdict for the defendant. It is hardly necessary to discuss this. The circular was libelous if the fact stated therein was untrue. The proof of its publication was plenary, if the jury believed the testimony. Whether the charge contained in the circular was true or not was for the jury.

Next it is argued that the court in its charge failed to appreciate the true principle of the law of libel; but as no specific errors are pointed out, we find nothing of substance to deal with in attempting to dispose of this phase of the case.

Another ground of reversal is predicated upon the following situation: The prosecutor of the pleas argued before

State v. Fish.90 N. J. L.

the jury that the defendant might be held guilty under the indictment if the jury should conclude that he had sent out the circular, and found no other fact against him. This was, of course, an erroneous statement of the law, but the harmfulness of it was probably neutralized by the charge of the court. But even if its injurious effect was not eradicated, it cannot be now appealed to as a justification for a reversal of the conviction. It is not properly presentable on any assignment of error, for no application was made to the court to deal with the statement; much less was there any exception to any ruling of the court upon the matter. It cannot be considered under section 136 of the Criminal Procedure act, because it does not come within any of the grounds specified in that section as a justification for a reversal. By that statutory provision the court of review is only permitted to reverse where the plaintiff in error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, or in the charge of the court, or in the denial of any matter by the court which was a matter of discretion.

Next it is argued that the statement just referred to was concurred in by the court by its oral declaration in the presence of the jury, and that there should be a reversal for this reason. But no exception was signed and sealed to the statement of the court, and so the present contention does not afford a basis for an assignment of error; and it cannot be considered under the one hundred and thirty-sixth section, for the reason that it does not come within the scope thereof.

Lastly it is contended that the proofs showed that Johnson, the libeled party, was a candidate for office, and that, therefore, the defendant was entitled to circulate libelous articles with relation to his character, provided he acted in good faith, believing them to be true. No authority is cited for any such contention, and it is manifestly without support in law.

On the whole case we think there should be an affirmance.

90 N. J. L.State v. Johnson.

THE STATE, DEFENDANT IN ERROR, v. ELWOOD JOHNSON,
PLAINTIFF IN ERROR.

Submitted December 12, 1916—Decided March 5, 1917.

The receipt of money which has been unlawfully or fraudulently obtained from another person, the receiver thereof knowing it to have been so obtained, is within the purview of section 166 of the Crimes act, as amended by *Pamph. L. 1906, p. 431*, relating to the receiving of stolen goods.

On error to the Monmouth Quarter Sessions

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *Halsted H. Wainwright*.For the state, *Charles F. Sexton*, prosecutor of the pleas.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The plaintiff in error was convicted upon an indictment which, as amended by leave of the trial court, charged that on the 17th day of July, in the year 1914, he, the said Elwood Johnson, did receive and have from one Charles Harvey, \$2,547.54 of the moneys, goods and chattels and other valuable things of one Agnes Crosbie before then feloniously, unlawfully and fraudulently obtained, taken and converted by said Harvey, he, the said Elwood Johnson, then and there well knowing said moneys to have been so obtained, taken and converted by said Harvey.

The indictment was intended to charge a violation of section 166 of the Crimes act, as amended May 14th, 1906 (*Pamph. L., p. 431*); and the first ground upon which we are asked to set aside the conviction is that the offence set out in the indictment is not within the purview of the sec-

tion referred to. The language of the act is, "Any person who shall receive or buy any goods or chattels or chose in action, or other valuable thing whatsoever, that shall have been stolen from any other person, or taken from him by robbery, or otherwise unlawfully or fraudulently obtained, taken or converted * * * knowing the same to have been stolen or taken by robbery, or so obtained, taken or converted, &c., shall be guilty of a misdemeanor." The present contention is that the legislature did not intend to include money in the descriptive words, "any goods or chattels, or chose in action, or other valuable thing whatsoever," used in the statute; and the case of *State v. Calvin*, 22 N. J. L. 207, is appealed to as decisive upon this point. In that case the defendant was indicted for and convicted of receiving a large number of bank bills amounting in value to \$4,000 of the property, goods and chattels of Drew, Robinson & Company, well knowing said bank bills were taken by robbery, &c. The indictment was founded upon the seventy-second section of the Crimes act of 1846, which provided that "If any person or persons shall receive or buy any goods or chattels that shall be stolen or taken by robbery from any other person, knowing the same to have been so stolen or taken by robbery, &c., he shall be deemed guilty of a high misdemeanor." It was held by the Supreme Court that bank notes are not "goods or chattels," within the meaning of the statute, and that, therefore, the receiver of stolen bank notes could not be indicted thereunder. The case was decided in 1849, and some two years afterward, on February 26th, 1852, the following act was passed by the legislature: "If any person or persons shall receive or buy any bank bill or note, bill of exchange, order, draft, check, bond, or promissory note for the payment of money, that shall be stolen or taken by robbery from any other person or persons, or corporation, knowing the same to have been so stolen or taken by robbery, he shall be deemed guilty of a high misdemeanor." *Nix. Dig.* (4th ed.) 210. It may be reasonably presumed that this later act was passed for the purpose of meeting the difficulty found to exist in the act of 1846 as construed in *State*

90 N. J. L.State v. Johnson.

v. Calvin, but whether this was its primary purpose or not, it certainly did meet that difficulty. These two provisions remained upon the statute books as independent enactments until the revision of our Crimes act in 1874, and they were then merged in section 147 of that act (*Revision of N. J.*, p. 253), which declares that "If any person or persons shall receive or buy any goods or chattels, or chose in action, or valuable thing whatsoever, that shall be stolen from any other person, or taken by robbery from him, knowing the same to have been stolen or taken by robbery, &c., he shall be deemed guilty of a high misdemeanor." That the purpose of the revisers was to merge these two statutes in the section just cited is manifest from the use of the words "or chose in action, or valuable thing whatsoever" (the latter clause being all embracing), and the disappearance from the statute book, except as found in this section, of the act of February 26th, 1852. The revision of 1898 retained that of 1874 without change (*Pamph. L.* 1898, p. 839, § 166), and the amendment of 1906 merely enlarges the scope of the statute by embracing property not stolen or taken by robbery, but otherwise unlawfully or fraudulently obtained, taken or converted.

We conclude, therefore, that the receipt of money which has been unlawfully or fraudulently obtained from another person, the receiver thereof knowing it to have been so obtained, is within the purview of the statute upon which the present indictment is founded.

It is next contended on behalf of the plaintiff in error that if it be considered that money is a valuable thing, within the meaning of the statute, the indictment is nevertheless defective, because it fails to show the kind of money; the argument being that the indictment should not only state the amount received by the defendant, but should specify that it was good and lawful money of the United States. But the answer to this contention is that by section 50 of our Criminal Procedure act (*Comp. Stat.*, p. 1836), it is provided "In every indictment in which it shall be necessary to make any averment as to any money or any note

of the United States of America, or of any national or state bank, or any other bank, or any postal currency, it shall be sufficient to describe such money, or currency, or note, simply as money."

It is next contended that there was no legal evidence before the court that the money of Agnes Crosbie had been unlawfully and fraudulently obtained by Charles Harvey, or that the defendant, when he received it, knew that it had been so obtained and converted. The assertion that there was no evidence of Harvey's misconduct is based upon the theory that this could only be proved by the production of the record of his conviction of that offence. But why counsel thinks this to be the case he does not make plain to us by his argument, and, manifestly, it is without substance. As to Johnson's knowledge of the misappropriation of these moneys by Harvey we find in the record sent up ample evidence to justify the jury in resolving that factor against him.

Lastly it is argued that the court erred in failing to instruct the jury that unless the circumstances of the case were such as to satisfy a man of ordinary intelligence and caution that these moneys had been embezzled by Harvey, the defendant should be acquitted. It is enough to say, in disposing of this contention, that no request to so charge was submitted to the trial court, and that no exception was taken to the instruction to the jury as delivered. Other errors were assigned by the defendant, but as they have not been referred to either in the brief or in the oral argument submitted in his behalf, we have considered them as having been abandoned, and consequently have not examined them.

On the whole case we conclude there should be an affirmance.

90 N. J. L.State v. Riccio.

THE STATE, DEFENDANT IN ERROR, v. MICHAEL RICCIO,
PLAINTIFF IN ERROR.

Submitted December 12, 1916—Decided March 5, 1917.

1. Where the proofs show that the defendant merely aided and abetted an abortion, without actually participating in the use of the instruments for effecting it, he may be convicted upon an indictment charging him with being a principal in the production of an abortion, all concerned in such a misdemeanor being liable as principals.
2. Where a defendant was indicted for assault and battery, as well as for abortion, upon the same female, testimony as to an alleged rape committed upon the female was clearly competent in proving the former offence.
3. Where the court erroneously charged the jury as to the duty to convict the defendant, if the jury found by the weight of the evidence that he did the thing named in the statute under which he was indicted, and subsequently corrected the charge, so that the jury were, in substance, told that they could only convict in case the weight of the evidence was so preponderating as to satisfy them upon that point beyond a reasonable doubt, the initial error in the charge was thereby cured.

On error to the Hudson Quarter Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *Horace L. Allen*.For the state, *Robert S. Hudspeth*, prosecutor of the pleas, and *George T. Vickers*, assistant prosecutor.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The defendant was convicted upon an indictment charging him with causing an abortion upon one Bella Marano by the administration of drugs, and the use of instruments. The indictment also contained a count charging him with an assault and battery upon the Marano woman.

The first ground upon which we are asked to set aside this conviction is that the indictment charged him with being a principal in the production of the abortion, whereas the proofs showed that he merely aided and abetted therein. But it has already been decided by the Court of Errors and Appeals that these facts do not render a conviction illegal, in the case of *State v. Wilson*, 80 N. J. L. 467. There the indictment charged the defendant with the use of instruments to procure a miscarriage; the question was whether under this indictment, he could be convicted if he did not actually participate in the use of the instruments, either by being present, aiding and assisting, or by being in a position where he could give direction as to the use of the instruments. The court held that in a case of misdemeanor, where all are liable as principals, the defendant may be convicted under an indictment charging him with the actual commission of the criminal act, although he was not personally present, and would in a case of a common law felony be liable only as an accessory; the reason being, as the court states, that such an indictment charges the defendant according to the legal effect of the offence, and, therefore, the defendant is, in legal effect, guilty of using the instrument for the criminal purpose.

Next it is contended that the state, over objection, was permitted to introduce in evidence the details of an alleged rape committed by the plaintiff in error on the said Bella Marano three months before the abortion, thus introducing evidence of an entirely independent crime. The testimony objected to was the statement of the witness that on the occasion of her first intercourse with the defendant, he took her upstairs in a room in his house where there was a mattress and two chairs and said to her, "If you don't do as I tell you I will shoot you." and at the same time took a big revolver out of his back pocket, and then threw her down and lifted up her clothes. The ground of the objection was that the state had no right to show the details of this occurrence, except as they showed a motive for the crime charged in the indictment, and that showing that "he brandished a

weapon, is going outside of the indictment." The court thereupon said, "I will strike out this last part as not being competent to this issue, that is, that he threatened her with some weapon." We think that the action of the court was sufficient to meet the objection as specified by the defendant's counsel, even upon the assumption that the testimony was incompetent. The contrary, however, is the fact, for the indictment not only charges abortion, but, as has already been stated, the crime of assault and battery, and the testimony was, of course, competent in proving this latter offence.

Next it is complained that it was reversible error for the court to instruct the jury that the indictment charged the defendant with aiding and abetting in bringing about an abortion upon the Marano woman. If an indictment which charges a person with being a principal in the bringing about of an abortion upon the body of a pregnant woman is sustained by proof that such person aided and abetted in bringing about that result, it is not unreasonable to hold that such an indictment, by implication, embraces in its charge such aiding and abetting. But assuming that it does not, and that the trial court erred in the statement complained of, manifestly no harm could have come to the defendant in instructing the jury that the indictment charged him with being guilty of an offence which the proofs showed him to have committed, and which justified his conviction on the indictment upon which he was being tried.

Next it is contended that the court erred in the following instruction to the jury: "It is for you to say whether this defendant did the thing named in the statute. Did he aid and abet by any means whatsoever with the intent of bringing about an abortion on this young woman. If he did, and you find it by the weight of the evidence in this case, your clear duty is to bring in a verdict of guilty." First, it is contended that the language used, "Did he aid and abet by any means whatsoever," gave the jury to understand that even if the defendant had been entirely innocent of any intention to bring about a violation of law, they might never-

theless find him guilty. It is enough to say that a reading of the whole charge satisfies us that it would have been impossible for the jury to have received any such idea from the language complained of. Nor do we think that the excerpt which is made the subject of the present objection, standing alone, conveys any such impression. As to the latter part of the instruction, that if the jury found by the weight of the evidence that he did so aid and abet, it was their duty to bring in a verdict of guilty, the attention of the court was immediately called to this slip, and it added the following to the instruction: "Of course, you will keep in mind what I said first—if you find he did this thing by the weight of the evidence, beyond a reasonable doubt, you should find him guilty. I have already emphasized to you he is entitled to the benefit of all reasonable doubt." Although the language used for the purpose of eradicating the erroneous instruction from the minds of the jury is not of the happiest, still we think it made it perfectly clear to the jury that they would not be justified in finding that the defendant did aid and abet in the bringing about of the abortion, unless the weight of the evidence was so preponderating as to satisfy them upon this point beyond a reasonable doubt.

Lastly, it is contended that the court, having admitted in evidence the illegal testimony with relation to the threats made by the defendant as to the use of a revolver upon the occasion of his sexual intercourse with the Marano woman, it was under a legal duty to charge the jury to dismiss that matter wholly from their minds, or in some proper manner to impress upon them that this illegal testimony was not evidential in the case. It is enough to say in disposing of this ground of reversal—*first*, that no request for such an instruction was submitted on behalf of the defendant; and, *second*, that the testimony stricken out was in fact competent in support of the count in the indictment charging the defendant with the crime of assault and battery.

On the whole case we conclude there should be an affirmance.

90 N. J. L.Wheaton v. Collins.

EDGAR T. WHEATON, RESPONDENT, v. JOHN COLLINS,
APPELLANT.

Submitted July 6, 1916—Decided March 5, 1917.

When a party enters into possession of premises which he has contracted to purchase, which contract he afterwards successfully repudiates on the ground that the title is unmarketable, and continues to occupy the premises after tender and refusal of the deed, he is liable to the owner for the fair rental value of the premises during the period of occupation.

On appeal from the Union Circuit Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the appellant, *John W. Bishop, Jr., and Kinsley Twining.*

For the respondent, *McCarter & English.*

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The plaintiff in this case brought suit to recover reasonable compensation for the use and occupation by the defendant of certain property belonging to the plaintiff in the town of Cranford. The trial resulted in a verdict in his favor, and from the judgment entered thereon the defendant appeals.

The situation disclosed by the proofs in the case was as follows: Wheaton was the owner of two houses and lots in Cranford, and entered into a contract with the defendant, Collins, for the sale thereof to him, the deed to be delivered on the 1st of April, 1911. The contract was entered into in September, 1910, and shortly thereafter—at least some time prior to the first of the following April—the defendant entered into possession of the premises. When April 1st arrived, plaintiff tendered a deed for the property to the

defendant, whereupon the latter refused to accept the delivery, upon the ground that the title was not marketable. He, however, continued in possession of the property. The plaintiff then filed a bill in equity against him to enforce the performance of the contract, but, as the proofs in the equity case disclosed that the plaintiff could not give a marketable title, the bill was dismissed. During all of this time the defendant remained in possession of the plaintiff's property. The present suit was then brought to recover from him the fair rental value of the premises during the period of occupation.

The first contention made before us is that the plaintiff was not entitled to recover under the pleadings in the present suit for the use and occupation of his property, unless the relation of landlord and tenant existed between the parties, and that no such relationship was disclosed. We do not find it necessary to determine the soundness of the proposition thus advanced. The real merits of the case were tried out, and the plaintiff was manifestly entitled to compensation for the deprivation of the use of his property. It was to meet just such a case as this that the legislature passed section 27 of the new Practice act of 1912, which provides that "no judgment shall be reversed * * * for error as to matter of pleading or procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party." *Pamph. L.* 1912, p. 377.

Next it is argued that the plaintiff was not entitled to recover compensation for the occupation of the premises by the defendant up to the time of the making of the decree by the Court of Chancery in the specific performance suit, because during that period the defendant was in possession as an equitable vendee under the contract of sale. It may be that if the equity suit had resulted in a decree for specific performance, the defendant's occupation up to that time might be considered as not being tortious, the extent of his obligation to the plaintiff being to pay the purchase price with interest from the date when the deed was agreed to be

90 N. J. L.Brunhoelzl v. Brandes.

delivered. But whether this be the legal situation, or not, under the circumstances suggested, we have no doubt that it does not lie in the mouth of the defendant to assert in one breath that he is in possession under a valid contract of sale, and therefore not liable to make compensation for his occupation of the premises, and in the next breath assert successfully that he is under no obligation to perform the contract, and is entitled to and does repudiate it.

The judgment under review will be affirmed.

CHARLES BRUNHOELZL, RESPONDENT, v. JOHN
BRANDES, APPELLANT.

Submitted December 15, 1916—Decided March 7, 1917.

1. The owner of an automobile lent it to an infant, by whose unskillful driving the car was injured. *Held*, that an action in tort against the infant will not lie.
 2. The liability of infants for their torts and their immunity from liability for their contracts cancel each other in so far as the gravamen of the tort and the breach of the contract have a common basis of fact, the rule being that an infant cannot be held liable for a tort that would in effect be the enforcement of his liability on his contract.
-

On appeal.

This was an action in tort brought to recover damages for injury to the plaintiff's automobile, resulting from the unskillful manner in which it was driven by the defendant, who was an infant.

The amended state of demand set forth that the plaintiff at the request of the defendant lent to the latter an automobile for use on the evening of June 29th, 1916, and that on that same evening the defendant reported to plaintiff that the automobile had upset and was damaged. There was no testimony by the plaintiff as to the cause of the acci-

Brunhoelzl v. Brandes.

90 N. J. L.

dent, which by the testimony of the defendant and those who were in the car with him, while possibly attributable to poor judgment or lack of caution, was not occasioned by recklessness, wantonness or gross negligence. At the close of the evidence the defendant's attorney moved for a direction upon the ground that the defendant was an infant, and that the testimony showed merely a breach of his contract of bailment, which motion was denied.

Before Justices GARRISON, PARKER and BERGEN.

For the appellant, *Michael Dunn*.

For the respondent, *Lynch & Barnitt*.

The opinion of the court was delivered by

GARRISON, J. The appellant's motion for judgment should have been granted. The general liability of infants for their torts does not take from them their special immunity from liability for their contracts; each rests upon a policy of the law. When these two policies come into conflict they cancel each other to the extent that they deal with the same subject-matter. If this cancellation be complete, so that all that is claimed as the foundation of the infant's tort is covered by the breach of his contract, nothing remains upon which to found an action of tort independently of the contract. The practical test, therefore, would seem to be not whether the tort arose out of or was connected with the infant's contract, but whether the infant can be held liable for such tort without in effect enforcing his liability on his contract.

In the present case the promise of the infant as bailee was that he would exercise reasonable care in driving the borrowed car. If injury came to the car because of the failure of the bailee to exercise such care, he cannot be held liable therefor in tort without being in effect held liable for a breach of his promise. The facts that constitute the breach of such promise cancel all of the facts that constitute the

alleged tort, leaving nothing over and above the breach of the contract upon which to found an action. This result, which harmonizes the two policies of the law, cannot be frustrated by allowing a plaintiff to elect to sue in tort rather than in contract, as he might do in the case of an adult where no similar policy was involved.

This, in somewhat more extended form, was the *ratio decidendi* of a very early case in this state. *Schenck v. Strong*, 4 N. J. L. 87.

The facts in that case were that the plaintiff had let the defendants have his riding chair (whatever that may be), to go a certain journey, in consideration of which they agreed to employ it for no different journey and to use it with moderation and care, notwithstanding which they did go a different journey and did carelessly and improperly break the chair in different parts. It being admitted that the defendants were infants, it was held that the plaintiff should have been nonsuited. The opinion delivered by Chief Justice Kirkpatrick goes much further than it is necessary for us to go in the present case, in which there was no departure from the stipulated use of the car, whereas in the decided case a different journey was taken. Without expressing any opinion upon this point, we consider the case an authority, as to the soundness of which upon the question involved we have no doubt.

In the earlier English case of *Jennings v. Rundall* (8 Term Reports, p. 335), Lord Kenyon, C. J., and the other judges of the King's Bench laid down the rule that we are applying to the present case, an excellent statement of which, with ample citations, will be found in 14 R. C. L. 261.

The judgment of the Paterson District Court is reversed, and, upon the facts stipulated in the agreed state of the case, judgment of no cause of action is ordered to be entered.

Ciesmelewski v. Domalewski.90 N. J. L.

MARCEL CIESMELEWSKI, APPELLANT, v. SYLVESTER
DOMALEWSKI, RESPONDENT.

Submitted December 15, 1916—Decided March 7, 1917.

Upon a trial before the District Court without a jury, it was not error to deny the plaintiff's request for a voluntary nonsuit made after the court had announced that judgment was given for the defendant.

On appeal.

Before Justices GARRISON, PARKER and BERGEN.

For the appellant, *Eugene R. Hayne* and *Anthony Botti*.

For the respondent, *James E. Pyle*.

The opinion of the court was delivered by

GARRISON, J. This was an action for slander tried before the District Court without a jury. Judgment was rendered for the defendant. Upon this appeal the plaintiff contends that it was error to admit the testimony of one Krzysiecki. Why the testimony of this witness was inadmissible is not stated in the brief or suggested by the two cases cited. The witness was called by the appellant and his cross-examination as to his relation to the parties and his interest in the case was entirely proper.

The other point argued is that plaintiff was not permitted to take a voluntary nonsuit after the court had announced that a judgment would be entered for the defendant.

There was no error in this ruling. Section 160 of the Practice act, which denies to a plaintiff the right to submit to a voluntary nonsuit after the jury have gone from the bar to consider their verdict, applies to the District Court. *Greenfield v. Cary*, 70 N. J. L. 613.

Where the court, sitting as a jury, has pronounced its judgment, the trial has progressed to a stage at which under

90 N. J. L.Haddon Heights v. Hunt.

this statute a voluntary nonsuit is not a matter of right. In such a case by analogy the verdict has not only been considered, it has been rendered.

The judgment of the First District Court of Jersey City is affirmed.

BOROUGH OF HADDON HEIGHTS, DEFENDANT, v. SAMUEL
P. HUNT, PROSECUTOR.

Submitted April 20, 1917—Decided April 23, 1917.

An ordinance, imposing an occupation tax, that provides for exemptions that have no rational connection with such occupation, is invalid.

On *certiorari*.

Before GARRISON, J.

For the prosecutor, *Cyrus D. Marter*.

For the defendant, *Jess & Rogers*.

GARRISON, J. The ordinance is infirm, whether the occupation tax be a police or a revenue measure, for the reason that there is no rational connection between the occupation that is taxed and the conditions that exempt from such tax.

Residence in the borough is admittedly not enough, and having a regular place of business is on the same footing, in the absence of a requirement that the business conducted at such place shall bear some relation to the wares so peddled.

To exempt a peddler of produce because he had a music store or a photograph gallery would be arbitrary in the extreme. Whether or not such suggested requirement would meet this defect is not up for decision.

The payment of real estate taxes on a residence or place of business affords no basis for exemption from an occupa-

Penna. R. R. Co. v. Gebhardt.

90 N. J. L.

tion tax; the two imposts are entirely unrelated. A non-resident might own and pay taxes on all the real estate in the borough and still be required to pay this occupation tax.

The grounds of exemption being thus arbitrary and illusory, the ordinance fails to support the conviction, which is set aside, with costs.

PENNSYLVANIA RAILROAD COMPANY, APPELLANT, v.
WILLIAM C. GEBHARDT, RESPONDENT.

Submitted December 15, 1916—Decided February 8, 1917.

The provision of the General Railroad law (3 *Comp. Stat.*, p. 1910, § 40), requiring that the clerk of the Supreme Court be carried free of charge, is unconstitutional as to any railroad company that is under no contract obligation to perform that duty.

On appeal.

Before Justices GARRISON, PARKER and BERGEN.

For the appellant, *Vredenburg, Wall & Carey*.

For the respondent, *Josiah Stryker* and *John W. Wescott*, attorney-general.

The opinion of the court was delivered by

GARRISON, J. This appeal presents the question of the constitutionality of the statutory provision that the clerk of the Supreme Court shall pass free of charge over all railroads operating within this state. *Pamph. L.* 1914, p. 358.

In the court below the constitutionality of this provision was assumed and judgment rendered for the defendant, the action having been brought by the railroad company for fares, which, but for such statutory provision, had been earned by the plaintiff.

90 N. J. L.Penna. R. R. Co. v. Gebhardt.

From the judgment thus rendered, the railroad company has appealed upon the ground that the statutory provision in question is unconstitutional.

In its essential features the case thus presented is indistinguishable from that of the secretary to the governor recently passed upon by the Court of Errors and Appeals *sub nomine Pennsylvania Railroad Co. v. Herrmann*, 89 N. J. L. 582. In that case, as in this, the obligation to carry the public official in question free of charge rested upon no contract between the railroad company and the state, contained either in the charter of such company or in the charter of any of its constituent companies, or in any general legislation under which any of such companies had been incorporated or under which they had received substantial accessions to their corporate powers. In the absence of any such contract obligation, it was held that a statutory requirement similar to the one now under review was an unconstitutional taking of the property of the stockholders of the railroad company that was not justified under the police power of the state or the reserved right of the legislature.

The sole point of difference that is relied upon to distinguish that case from the one before us, is that in the decided case the legislative provision for free carriage was enacted in 1907, whereas, in the present case, such provision was enacted in 1873. It is not contended that this difference in dates gives rise to any contract right, on the contrary the earlier provision is sought to be sustained solely as a valid exercise of the police power; to which end an excerpt from the opinion of this court in the case of *Delaware, Lackawanna and Western Railroad Co. v. Board of Public Utilities Commissioners*, 85 N. J. L. 28, is quoted and relied upon. The language thus quoted, as was pointed out by the Court of Errors and Appeals in the Herrmann case, occurred in the discussion of a side issue of purely speculative interest that did not enter into the decision of the case. For this reason the soundness of the views suggested in this connection was not considered in the appellate court.

Now, however, when they are put forward by counsel as the basis for the decision of the case in hand, the views thus relied upon have been considered not for the purpose of determining their historical value in accounting for the probable motives that actuated earlier legislation, but for the purpose of determining their constitutional value in supporting such legislation as a valid exercise of the police power. Regarded in this latter aspect, we find nothing in the view urged by counsel, no matter from what source derived, that constitutionally justifies the imposition upon the stockholders of railroad companies of the financial burden of furnishing free transportation to state officials.

In so far as such a view apparently receives support from the language of our earlier opinion, such language was unfortunate and calls for definitive treatment, since its untoward results have not been effectually counteracted merely by pointing out the *obiter* character in which such language was employed.

In this connection we may add that no theory of the police power that has been suggested, or brought to our attention, justifies in our judgment the imposition of the statutory requirement under consideration by any general legislation, early or late, that does not in legal effect give rise to a contract obligation upon the part of the railroad company to perform the duty imposed upon it. The present case, therefore, is not distinguishable from that of *Pennsylvania Railroad Co. v. Herrmann*, and hence upon the authority of that case the judgment of the District Court in the present case is reversed, and judgment given in favor of the appellant for the sum due it by the stipulation of the parties in the court below.

90 N. J. L.Roth & Miller v. Temkin.

ROTH & MILLER, A CORPORATION, RESPONDENT, v. HYMAN TEMKIN AND SAMUEL LEVY, APPELLANTS.

Submitted December 15, 1916—Decided April 5, 1917.

A broker who procures a loan of money for his principal under the express contract of the latter to pay him a greater compensation than that allowed by section 5 of the Usury act, may, notwithstanding such void contract, recover the reasonable value of his services, not exceeding the statutory rate.

On appeal.

Plaintiff corporation, engaged in the real estate, insurance and mortgage loan brokerage business, entered into a written contract with defendant Hyman Temkin, engaging plaintiff to procure a mortgage loan of \$18,000 upon property of defendants on Ravine street, Jersey City, in said contract mentioned, for procuring which and the expense of search, said defendant Temkin agreed to pay plaintiff the sum of \$550 and give it the business of placing the insurance upon said property, which business, it, plaintiff, conducted for profit. The expenses of search and other expenditures for procuring such loan were about \$160, thus leaving the plaintiff \$390 as brokerage for procuring said loan. The plaintiff in pursuance of said contract, negotiated for, and procured a loan of \$18,000, \$2,000 of which was payable in installments, for a period of two and one-half years. The defendants, Temkin and Levy, accepted the mortgage loan of \$18,000 encumbering their property on Ravine avenue, Jersey City.

The defendant Levy was a partner of defendant Temkin, and the owner of the mortgaged premises, and while he took no personal part in the negotiations for this loan—his partner Temkin acting in the matter—both defendants accepted the loan and Levy signed the bond and mortgage securing it.

A previous action was brought by this plaintiff against these defendants, upon the said written contract, in which

Roth & Miller. v. Temkin.

30 N. J. L.

the court found that the said contract was usurious and entered into in violation of section 5 of the Usury act in that the plaintiff was by the terms of said agreement, to receive in value as brokerage for procuring said loan, more than fifty cents on \$100 for a year, in which action, for said cause, the court nonsuited the plaintiff. The record of said action was offered and received in evidence in this case. No other agreement was made between the parties than therein set forth. This action is for the recovery of the reasonable value of the services rendered by plaintiff under said contract, and the court found that the sum of \$217.50 is the reasonable value of such services, and rendered judgment for plaintiff against both defendants for said sum, with costs, to which ruling of the court defendants prayed and were allowed an exception.

The defendant Levy requested the court to find that he was not a party to said contract, nor did he take part in the active negotiations of the same, which finding the court made.

The defendant Levy further requested the court to find that the mere fact that Temkin was his partner at this time, and partner in the ownership of said real estate would not authorize Temkin to bind him by the contract or agreement in suit, and that judgment should be rendered in favor of defendant Levy against the plaintiff, which finding the court refused to make, and to which ruling of the court defendant prayed and was allowed an exception.

Defendants further requested the court to find that no recovery could be had in this case for the reasonable value of plaintiff's services, because there was an express agreement between the parties embracing the same subject-matter, which finding the court refused to make, to which ruling of the court defendants prayed and were allowed an exception.

The defendants requested the court to find that because the contract between the parties was usurious and in violation of section 5 of the Usury act, the plaintiff could not recover in this action, which finding the court refused to

90 N. J. L.Roth & Miller v. Temkin.

make, and held that plaintiff was entitled to recover in this action, to which ruling the defendants prayed, and were allowed an exception.

Section 5 of the Usury act (4 *Comp. Stat.*, p. 5706), reads as follows:

"That every solicitor, scrivener, broker, or driver of bargains, who shall directly or indirectly, take or receive more than the rate or value of fifty cents for brokerage, or soliciting or procuring the loan or forbearance of one hundred dollars for a year, and so in proportion for a greater or less sum, or for a longer or shorter time, or above twenty-five cents for drawing, making or renewing the bond or bill for such loan or forbearance, or for any counterbond or bill concerning the same, shall, for every such offence, forfeit sixteen dollars, to be recovered by action of debt, with costs, by any person who shall sue for the same; the one moiety to the prosecutor, and the other to the state."

Before Justices GARRISON, PARKER and BERGEN.

For the appellants, *Gross & Gross*.

For the respondent, *Frederick C. Henn*.

The opinion of the court was delivered by

GARRISON, J. The appellant Temkin, having had the benefit of the services rendered by the respondent at his request, seeks to avoid paying the reasonable value thereof, because he had expressly promised to pay therefor a larger sum than that permitted by section 5 of the Usury act.

This penalization of the respondent finds no justification in the language of the statute or in its policy, which is directed not against the borrowing of money or the rendition of services in connection therewith, but, on the contrary, recognizes the legality of such services by fixing the maximum compensation that may lawfully be received therefor.

The penalty for the violation of this provision is not a forfeiture, as in the historic Usury act, but a specific penalty

to be recovered in a *qui tam* action. The contract is unlawful in the sense that it is in law non-existent and, hence, unenforceable, but such illegality does not relate to the services themselves so as to render them immoral, or incapable of being made a basis of recovery independently of the void express contract. It is this feature that distinguishes usury statutes from contracts that call for the doing of that which is immoral or reprobated on grounds of public policy, in which case the courts are closed to the parties in pursuance of a judicial policy that thus purposely penalizes the participants in such immoral and illicit transactions; but where the sole illegality in a contract, otherwise lawful and moral, is that it calls for a compensation that is not allowed by statute, the courts have no judicial policy other than that of seeing that the statute is observed and that such penalties or forfeitures as the legislature has provided are enforced. The statute contains a prohibition and a penalty, each of which in an appropriate action the courts will enforce; the statute contains no forfeiture and presents no occasion for the construction of one by judicial policy.

This was the view taken of a similar statute by the appellate division of the Supreme Court of New York in a case that arose out of a written agreement to pay a stipulated sum for certain services looking to the setting aside of the will of Samuel J. Tilden, in connection with which the plaintiff claimed that he had procured for the defendant a loan of \$30,000.

The agreement being in evidence and the Usury act being substantially similar to ours, a motion to nonsuit was made at the trial upon the grounds urged in the present case. In denying this motion the trial court said: "I decide that the plaintiff cannot maintain an action upon that paper; but, inasmuch as it is the right of this plaintiff to recover against this defendant for services which he has rendered at his request, he may go to the jury upon that theory and recover what the jury shall say his services were worth, provided the jury will find that the defendant employed him to render services."

Upon appeal, Justice Cullen said: "There is no provision in the statute rendering a contract or agreement to pay a greater compensation than that prescribed wholly void. One who renders services as a broker under an agreement to pay a higher compensation is entitled to receive pay for his services, but he cannot recover any more than the statutory compensation. As the statute merely prescribes a rate of compensation, but does not defeat the action, it was not necessary for the defendant to plead the statute; no recovery could be had against the defendant for the alleged breach of his written agreement, we do not see why the plaintiff was not entitled (if the jury found the facts in his favor) to recover for the services at the statutory rate." *Buchanan v. Tilden*, 18 App. Div. (N. Y.) 123.

The view thus illustrated seems to us to be both in theory and in practice preferable to the opposite view which makes a gratuity of services rendered to one who expected to pay for them merely because he agreed to pay for them more than the plaintiff was legally entitled to receive. This is both harsh and illogical. The rendition and acceptance of the services gave a complete right of action, subject to the statutory limitation as to the amount to be recovered, which cannot be exceeded by the making of an express agreement on which an action could not be maintained. Such a contract being void leaves the right of action that was entirely independent of such contract unaffected by anything in the statute which expressly provides a penalty that is utterly inconsistent with the forfeiture of all right of recovery upon a perfectly valid right of action.

Finding nothing in the statute that forfeits the plaintiff's right to recover for his services within the statutory rate, and no judicial policy that requires or would justify the imposition of such a penalty, it remains only to mention the other contention of the appellant, viz., that the plaintiff cannot recover upon a *quantum meruit*, because he has an express contract. The plaintiff has no express contract, the statute settles that, and it is also *res adjudicata* and the law of the case as between these parties.

Buohl v. Beverly.90 N. J. L.

We are not saying that the earlier case was properly decided, that question is not before us. It was decided in favor of the defendant, and, hence, he cannot now say that an express contract that was non-existent when an action was based upon it, is existent when an action is not based upon it. The appellee had a right of recovery against the appellant Temkin, upon the testimony set forth in the state of the case, but there was no testimony to support a judgment against the appellant Levy. The mere fact that Levy was a partner of Temkin and that he joined in the execution of the mortgage is not enough, the transaction was not partnership business, and the fact that a broker was employed or was necessary, does not appear by the state of the case to have been even known to Levy. There was, therefore, no basis for the raising of an implied contract between Levy and the plaintiff. The judgment of the Second District Court of Jersey City is affirmed as to the appellant Temkin and reversed as to the appellant Levy.

CHARLES A. BUOHL, PROSECUTOR, v. BOARD OF COMMISSIONERS OF THE CITY OF BEVERLY, RESPONDENT.

Submitted December 13, 1916—Decided February 27, 1917.

1. The legislature did not intend by the provisions for the initiative in the Walsh act (*Pamph. L. 1911, p. 462*) to make it possible to change fundamentally the scheme of government with power concentrated in the commissioners therein provided for, and again scatter the powers among different boards.
2. The act to establish an excise department (*Pamph. L. 1901, p. 239; Comp. Stat., p. 2918*) is superseded by the Walsh act (*Pamph. L. 1911, p. 462*) in cities which adopt the latter.

On application for *mandamus*.

Before Justices SWAYZE, MINTURN and KALISCH.

90 N. J. L.Buohl v. Beverly.

For the application, *Stackhouse & Kramer*.

For the respondents, *Ernest Watts* and *John S. Horner*.

The opinion of the court was delivered by

SWAYZE, J. This is an application for a *mandamus* to compel the authorities of Beverly to call an election to pass on a proposed ordinance creating a board of excise commissioners for that city. The proposed ordinance was initiated by petition under the Walsh act. *Pamph. L.* 1911, p. 462. The authority to create an excise commission exists, if it exists at all, under the act of 1901. *Pamph. L.*, p. 239; *Comp. Stat.*, p. 2918. The important question is whether that act has been superseded in cities adopting the Walsh act.

By the amendment of 1914, it was enacted that municipalities which had adopted the act were a distinct class and should not be subject to any laws of this state except laws applicable to all municipalities other than counties and school districts. *Pamph. L.* 1914, p. 253. If this legislation were valid, it would be entirely clear that Beverly would not be subject to the act of 1901. But it has been settled that cities under the Walsh act do not for this purpose constitute a valid class under the constitution. *Delaware River Transportation Co. v. Trenton*, 86 N. J. L. 48; *affirmed*, *Id.* 679.

There can be no doubt that the object of the Walsh act was to concentrate all the powers of the municipality in the commissioners provided for by that act. The language of section 4 is explicit. The question now presented is whether the power is so extensive that the commissioners may themselves abdicate a portion of their power in favor of an excise commission authorized by another and earlier act applicable to all cities and towns except cities of the first class; or rather the question is whether the commissioners can be thus compelled to abdicate the power given them by the Walsh act by means of a vote on a measure initiated against the will of the commissioners.

The language of section 8 of the Walsh act as amended in 1914 by what is called the Hennessy act, is broad enough to authorize such a fundamental change; but we think the same reason that led to the condemnation of section 1 of the Hennessy act requires the condemnation of section 2. We know no reason why cities governed by the Walsh act should have these extensive powers of what is called home rule, that is not applicable to cities governed under other acts; and unless there is some such reason, the classification according to well-settled principles is illusory. We think the proposed ordinance cannot be justified under the act of 1914.

The next question is whether it can be justified under the act of 1911 (Walsh act) as amended in 1913. The creation of an excise board by city ordinance is certainly one of the powers possessed by the governing body of the city prior to the act of 1911. It therefore passed to the commissioners, if we look only at the language of section 4. That language, however, must be construed in the light of the intention of the legislature as evinced by the general scheme of the act. Looking at it in that light, we think the legislature could not have meant to put it in the power of fifteen per cent. of the voters to compel the commissioners to submit to the voters an ordinance which would divide the powers of government which the act showed a clear purpose to concentrate. If the commissioners can thus be shorn of their power over the sale of intoxicating liquors, they can be shorn of many other powers, in fact of all powers they may have been authorized to exercise by ordinance. For instance, the commissioners of the city of Jersey City, which has adopted the Walsh act, might by ordinance, initiated by fifteen per cent. of the voters, and adopted perhaps by a bare majority on a very light vote, be forced to give over again to a board of street and water commissioners or a board of finance the very powers that were taken away by the adoption of the Walsh act. With the policy of ordinances initiated by a small per cent. of the voters we have at present no concern. All we now hold is that the legislature did not intend by the provisions for the initiative in the Walsh act to make it

90 N. J. L.Curtis v. Joyce.

possible to change fundamentally the scheme of government with power concentrated in the commissioners therein provided for, and again scatter the powers among different boards.

The application is therefore denied, with costs.

G. HOWARD CURTIS, RESPONDENT, v. CHARLES E. JOYCE,
PROSECUTOR.

Argued November 9, 1916—Decided February 21, 1917.

1. A conviction setting forth that the defendant operated an automobile on High or Main street in the town of Mount Holly, township of Northampton, &c., while under the influence of intoxicating liquor, sufficiently shows a violation of the act of 1913 without finding that High or Main street was a public street.
 2. A defendant who desires to object to the jurisdiction of a magistrate on the ground of bias, should do so before the trial or argument.
-

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *James Mercer Davis*.

For the complainant, defendant in *certiorari*, *V. Claude Palmer*.

The opinion of the court was delivered by

SWAYZE, J. Before dealing with the questions raised in this case, we think it advisable to call attention to the method of entitling the cause. It is entitled *Charles E. Joyce v. The Judge of the Court of Common Pleas of Burlington County*. All that the judge had to do with the case was to hear it on review of the proceedings had before the recorder. While the writ is directed to him, he is no party to the cause

Curtis v. Joyce.

90 N. J. L.

and should not be so treated. The case should be entitled under rule 15 as it was before the recorder, G. Howard Curtis v. Charles E. Joyce.

No reasons are printed, but as the complainant, defendant in *certiorari*, makes no objection, we deal with the reasons set forth in the prosecutor's brief.

The proceeding is under the supplement of 1913 to the Disorderly Persons act. The complaint charges that Joyce operated and drove an automobile on the "highway of the street of Mount Holly known as High or Main street while under the influence of intoxicating liquors." He was convicted of having operated an automobile on High or Main street in the town of Mount Holly, township of Northampton, county of Burlington, in the State of New Jersey, while under the influence of intoxicating liquor. We think this is enough to show that the offence was committed upon the public street or highway. The complaint charges that it was on the highway of (evidently a misprint for "or") the street known as High or Main street, and although the conviction does not use the word highway, we think there is a presumption that the High or Main street of a town is a public street.

As to the alleged bias of the recorder, we agree with the judge of the Common Pleas that the prosecutor should have challenged before the case was heard, as provided by section 225 of the Practice act. *Comp. Stat.*, p. 4122. Although this is a section of the Practice act, it enacts a rule which should govern in all courts. It would be intolerable to allow a litigant to speculate on the result of a case, and raise a question of jurisdiction only after the decision. If the prosecutor did not know the alleged bias at the time, it may be his misfortune, but it is a misfortune arising out of a want of knowledge that it was his duty to acquire if he wanted to profit by it.

We think the conviction is sufficient in form. This disposes of the reasons argued. The eighth reason, if we may judge from the respondent's brief, raises the question that

90 N. J. L.Dale v. Bayhead.

the prosecutor was deprived of his constitutional right to a trial by jury. This question is similar to that discussed in the Rodgers case just decided, and it would be interesting to consider whether the same rule would apply to a case where the only proof was that the defendant drove an automobile on a public street while he was under the influence of intoxicating liquor. We are precluded from dealing with this question as the prosecutor has abandoned his eighth reason.

The judgment must be affirmed, with costs.

AMY SLADE DALE, PROSECUTOR, v. BOROUGH OF BAY-
HEAD, RESPONDENT.

Argued November 10, 1916—Decided February 27, 1917.

By virtue of the act of 1916 (*Pamph. L.*, p. 525), an ordinance for the issue of municipal bonds is conclusively presumed to have been duly and regularly passed and to comply with the provisions of the statutes; and its validity cannot be questioned except in a suit, action or proceeding commenced prior to the expiration of the twenty days after the first publication of the statement required by the act. *Held*, in an action commenced after the expiration of the twenty days, that the conclusive presumption applies to a case where the municipality had lawful authority to make the improvement at the time proposed for the issue of the bonds although not at the time of the first publication of the ordinance and that the validity of the ordinance could not be questioned.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Charles E. Scribner*.

For the defendant, *Clarence H. Murphy*.

VOL. XC.

4

Dale v. Bayhead.

90 N. J. L.

The opinion of the court was delivered by

SWAYZE, J. The question is the validity of an ordinance providing for the issue of bonds for the construction of a sewer system. The ordinance for the bonds was passed by the council July 17th, 1916. It was published July 21st. The statement published therewith as required by statute gave notice that the bonds would be issued and delivered after August 18th; but would not be issued if protest was filed under section 9, chapter 252 of the laws of 1916, unless a proposition for the issuance was adopted at an election under that section. There was no protest. Thereupon, by virtue of section 2, paragraph 3 of the act of 1916 (*Pamph. L.*, p. 525), the ordinance was conclusively presumed to have been duly and regularly passed and to comply with the provisions of that or any other act. It is said, however, that this conclusive presumption is not applicable to a case where the borough is not lawfully authorized to issue bonds. We do not doubt that proposition. The answer is that it is not applicable; in this case, on the day fixed for the issue of bonds, August 18th, the borough had the authority; by virtue of an election held August 1st, pursuant to section 90 of the Borough act. *Comp. Stat.*, p. 273. It is urged that the ordinance for the issue of the bonds was passed before that election and that the borough had no authority to construct sewers at the time the ordinance was passed and the statement published. This fact, however, shows only a failure in the proceedings for the bond issue, and in the absence of the protest provided for by the act we are compelled to the conclusive presumption that the ordinance was duly and regularly passed and complied with the statutes; by express statutory provision the validity of the ordinance cannot be questioned, since no action or proceeding was commenced prior to the expiration of the twenty days. Cases decided prior to the act of 1916 are not applicable. The writ is dismissed, with costs.

90 N. J. L. Fidelity Trust Co. v. Essex Bd. of Taxation.

FIDELITY TRUST COMPANY, EXECUTOR OF THOMAS L.
CARROW, PROSECUTOR, v. ESSEX COUNTY BOARD OF
TAXATION ET AL., RESPONDENTS.

Submitted December 15, 1916—Decided February 27, 1917.

1. A taxpayer, on May 20th, owned household goods, jewelry, promissory notes, and deposits in bank, and was assessed for personalty at the value of the household goods only; the county board of taxation subsequently assessed the jewelry, promissory notes and deposits in bank as omitted property. *Held*, that this was correct, and that the county board was not bound to take the proceedings required in the case of undervalued property.
2. Where it is discovered after the owner's death that personal property has been omitted from taxation, it is a sufficient compliance with the statute to give notice of the assessment of the omitted property to the executor, who is then the owner.
3. Where an owner dies after May 20th, and property omitted is subsequently assessed, it should be assessed in the name of the owner on May 20th, not in the name of his executor.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Louis Hood*.

For the defendants, *Harry Kalisch*.

The opinion of the court was delivered by

SWAYZE, J. This case is in narrow compass. Thomas L. Carrow was assessed in 1915 for personal property valued at \$200. He died August 3d, 1915. On December 13th the county board of taxation made an assessment against his executor for personal property, \$50,900, as omitted property. Notice was at once given to the Fidelity Trust Company, the executor, which stated that they would be heard by the county board on December 18th. They were heard by counsel on that day, and the assessment was affirmed. It is not

Fidelity Trust Co. v. Essex Bd. of Taxation. 90 N. J. L.

questioned that Carrow on May 20th had that amount of assessable property. It was apparently made up of the following items taken from the inventory of his estate: Household furniture, \$200; jewelry, \$232; note of Waring, \$100; note of Mager, \$6,500; loan to Waring, \$2,000; deposit in savings department of Fidelity Trust Company, \$5,433; deposit in banking department of Fidelity Trust Company, \$36,468. The first point made is that the case is one of undervaluation of property assessed, and not an assessment of property omitted by the assessor. On this premise the prosecutor argues that the county board could not act of their own motion, but must have a written complaint of the collector, a taxpayer, or the governing body of the taxing district, as required by section 28 of the Tax act. *Comp. Stat.*, p. 5107. The question is one of fact. We must assume in accordance with the ordinary presumption that the assessor acted honestly. If so, he evidently assessed only the household goods at 224 Broad street, which were later inventoried at the exact amount of the assessment. No doubt this was because the household goods were the only personal property visible and, with the exception of the jewelry, the only tangible personal property. We think the assessor assessed the household goods only and omitted to assess the jewelry, notes, loans and bank deposits. The board was right, therefore, in following the procedure prescribed for omitted property. We attribute no weight to the stipulation that the taxing authorities of the city of Newark assessed all the personal property of which Thomas L. Carrow was possessed on May 20th, 1915, in the sum of \$200 in bulk. The most this can mean, in view of the facts revealed by the inventory is that they assessed all the personal property so far as they knew, the most that anyone could do.

It is also argued that notice of the addition to the assessment was not given to the owner as required by section 28. If by "owner" the statute means owner on May 20th, the prosecutor is right, since that owner was dead. This is not the proper construction since it is unreasonable, and would

90 N. J. L. Fidelity Trust Co. v. Essex Bd. of Taxation.

require not merely an impossibility but an absurdity. We assume that the legislature meant what it said in section 2 of the Tax act that all personal property within the jurisdiction of the state not expressly exempted should be subject to annual taxation at its true value. This can only be accomplished in a case where omitted property is discovered after the owner's death by giving notice to his executor or administrator. The executor or administrator is then the owner, and there is no other owner to whom notice can be given.

It was erroneous to assess in the name of the executor, which had no title on May 20th. This error, however, does not release the property from taxation. The court is required to make a proper levy, imposition or assessment in all cases in which there may lawfully be an assessment, imposition or levy. *Comp. Stat.*, p. 5124, § 39. We see no difficulty caused by the provision of section 5 of the Tax act (*Comp. Stat.*, p. 5085), that persons assessed for personal property shall be personally liable for the taxes thereon. This can only mean that persons liable to taxation for personal property on May 20th shall be personally liable for the tax; this personal liability exists at their death, and like any other personal liability then existing is to be satisfied out of their estate.

There is no dispute about the amount and we will make the assessment against Thomas L. Carrow at the valuation and rate already fixed, and the total amount of the tax will be the same.

Although we find a defect in the assessment as made below, the substantial victory is with the defendants, and the prosecutor will not be allowed any costs.

NICHOLAS LOWRIE, PROSECUTOR, v. STATE BOARD OF
REGISTRATION AND EXAMINATION IN DENTISTRY,
RESPONDENT.

Argued November 8, 1916—Decided February 21, 1917.

1. Proceedings under the act of 1915 (*Pamph. L., p. 261*) for illegal practice of dentistry are essentially a civil suit, subject to the procedure of the court in which they are brought. The defendant is entitled to jury trial if demanded.
2. In a complaint under the act of 1915 (*Pamph. L., p. 261*) for illegal practice of dentistry, it is enough to charge illegal practice in the language of the statute without setting forth specific instances, to aver that the illegal practice was during a named month without specifying the days, and that it was at defendant's office in a named city without further specifying the place.
3. The legislature may authorize imprisonment for non-payment of penalties imposed for offences that involve injury to the public.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Harry H. Weinberger*.

For the defendant, *Josiah Stryker* and *John W. Wescott*, attorney-general.

The opinion of the court was delivered by

SWAYZE, J. The prosecutor was convicted by the Passaic District Court under the act of 1915 (*Pamph. L., p. 261*) of practicing dentistry without a license. Of the numerous reasons for reversal we deal only with those which the counsel for the prosecutor deemed worthy of argument in his brief.

1. As to the argument that the District Court lost jurisdiction because a trial by jury was demanded and refused, it is enough to say that the record fails to show any demand for jury trial. If we look back of the brief, we find that the

thirteenth reason makes a broader claim and avers that the statute itself is unconstitutional because it fails to provide for a trial by jury. It is true that the act contains no express provision to that effect, but the absence of an express provision is not conclusive against the right to trial by jury. The right depends upon the procedure required by the statute, and that in turn depends on whether proceedings under the Practice of Dentistry act of 1915 are summary proceedings before the judge sitting as a magistrate, or are essentially an ordinary civil action subject to the procedure of the District Court, if brought in that court, or the procedure of the Common Pleas, if brought there. There is language in the statute which indicates that the legislature intended that the proceeding should be a summary one similar to summary proceedings before a magistrate without a jury. The fourteenth section provides for a hearing in a "summary manner," and the sixteenth section sets forth a form of "conviction." These words are proper only to a summary proceeding. The authorization of a warrant as the process to bring the defendant into court affords no argument, since a warrant may be used in a civil action as well as in a summary proceeding, and this very statute authorizes as well a summons, which is more applicable to civil suits. There are other expressions, however, which clearly show an intention that the proceedings should be in the nature of a civil suit. The very facts that the courts to which jurisdiction is given are courts that, except for this and a similar statute as to the practice of medicine, deal only with civil suits, and that it is the "court" and not the judge as a magistrate who is to hear testimony and give judgment, are persuasive that the legislature had in mind an ordinary civil suit. Other expressions in the fourteenth section are conclusive. The proceeding is one between two parties, the board of registration and examination in dentistry, "as plaintiff," and the defendant. The word plaintiff is quite inappropriate to summary proceedings. Provision is made for hearing "*without the filing of any pleadings.*" No such

provision would have been necessary or would have been thought of in any but an ordinary civil suit, where but for the statute, pleadings would have been required. Unless we are to assume that the legislature did not use legal terms in their well-established legal sense, we must assume that if they had meant the proceedings to be summary, they would have used the word complaint and not the word pleadings. If we look further than the mere language of the statute at its substance, we find that not only is the proceeding in effect a suit *inter partes*, but the judgment, if against the defendant, is for the plaintiff—the dentistry board—for its own benefit. Moreover, section 17 enacts that the costs shall be the same as costs taxed in actions in said courts, and that if the judgment is in a District Court, it may be docketed in the same manner as other judgments in that court. The fact that imprisonment is authorized in case of failure to pay the judgment, does not affect our conclusion, since that point was involved and decided in cases under similar statutes. *White v. Neptune City*, 56 N. J. L. 222; *Board of Health v. Cattell*, 73 *Id.* 516; *Tenement House Board v. Gruber*, 79 *Id.* 257. The present case is, if possible, clearer than those, especially since the legislature must be presumed to have known of those decisions when it passed the act of 1915 and modeled it on the statutes there construed. We conclude, therefore, that the defendant would have been entitled to trial by a jury if he had made the demand required by the District Court act, and his present objection to the constitutionality of the act of 1915 fails. But as the record fails to show an application for a jury, no error appears in this respect.

2. It is argued that the complaint is defective because not definite and specific as to the time when, place where, and person upon whom, the defendant practiced dentistry. We think that when, as in this case, the offence is charged in the language of the statute, it is not necessary to set forth in the complaint each specific instance that may be relied on as evidence of the practice. No reason is suggested why the

ordinary rule sustaining that method of pleading statutory offences is inapplicable. As to the allegation of time, we think that in the case of a continuous offence like the present, it is enough to charge, as is here done, that the defendant practiced dentistry during the month of January, 1916. As to the allegation of place, we are unable to see any force in the argument that an allegation that the defendant practiced dentistry at his office in the city of Passaic is not sufficiently definite.

3. It is argued that the act of 1915 is unconstitutional because it authorizes the court to commit a defendant to the county jail for failure to pay the amount of the judgment rendered against him. As far as we know the only constitutional provision limiting the power of the legislature in this respect is that forbidding imprisonment for debt. That provision, however, does not apply to penalties for offences that involve injury to the public even though the statute gives the penalties to a private individual. It was so decided by the United States Supreme Court in a case involving the construction of the act for the government of the Philippine islands. *Freeman v. United States*, 217 U. S. 539. The report of this case in 19 *Ann. Cas.* 755 has a valuable note collecting the authorities. We cannot doubt that it is within the power of the legislature to make the practice of dentistry without license an offence against the public, since they may well think it involves public injury, and to punish it by fine or penalty, and to authorize imprisonment for non-payment of the penalty. The practice to that effect in other cases has been long continued.

The judgment must be affirmed, with costs.

Musconetcong Iron Works v. Netcong.90 N. J. L.

MUSCONETCONG IRON WORKS, PROSECUTOR, v. BOR-
OUGH OF NETCONG, RESPONDENT.

Submitted December 7, 1916—Decided February 21, 1917.

1. Under section 39 of the Tax act (*Comp. Stat.*, p. 5124), an assessment for taxation cannot be set aside for irregularity or defect in form or illegality in assessing, laying or levying the tax, if, in fact, the person so assessed is liable to taxation in respect of the purpose for which the tax is levied.
2. An assessment of taxes cannot be set aside on *certiorari* on the ground that the aggregate amount of money levied or assessed in any taxing district for taxes is greater than called for by the law or resolution granting it. *Comp. Stat.*, pp. 5121, 5122.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Edward K. Mills*.

For the respondents, *Charles A. Rathbun*.

The opinion of the court was delivered by

SWAYZE, J. The prosecutor was assessed for \$100,000 personalty. The assessment was made by the borough collector on the orders of the borough council as of property omitted by the assessor. The fact that there was taxable personal property of that amount consisting of pig iron is not disputed. It is said the notice given by the collector was not in compliance with the statute because the collector did not give notice of the meeting of the county board of taxation, sitting on appeal. Such notice as was given is said not to have been received until December 20th. This can hardly be called adequate notice, but no harm was done since the prosecutor not only appealed to the county board but succeeded in its appeal. Thereupon, the borough appealed to the state board, and after a hearing, in which both

sides were represented by counsel, the judgment of the county board was reversed. Then the taxpayer sued out this *certiorari* and the whole matter has been submitted to us by briefs in behalf of both parties. Under section 39 of the Tax act, we are forbidden to set aside the tax for irregularity or defect in form or illegality in assessing, laying or levying the tax, if in fact the prosecutor is liable to taxation in respect of the purpose for which the tax is levied. Such is the present case. This disposes of most of the objections.

It is urged, however, that \$100,000 is so large an addition to the ratables of Netcong that some correction should be made by way of lowering the rate of taxation to atone for the great increase in ratables. *State v. Randolph*, 25 N. J. L. 427, is relied on. The argument overlooks the changes in the Tax act since 1856. Section 38 (*Comp. Stat.*, pp. 5121, 5122) enacts that no assessment of taxes shall be set aside on *certiorari* because the aggregate amount of money levied or assessed in any taxing district for taxes is greater than called for by the law or resolutions granting the same. That is exactly the present case. The rate is the legally authorized rate; the aggregate amount is greater than called for because of the addition of this omitted property. No injustice results, as Justice Parker pointed out in *Pennsylvania T. & T. R. R. Co. v. Hendrickson*, 87 N. J. L. 239.

It is also said that the prosecutor was not allowed to deduct its debts. If this deduction would otherwise be allowable, it is not allowable under the act of 1914. *Pamph. L.*, p. 353.

The assessment made by the state board is affirmed, with costs.

State v. Rodgers.90 N. J. L.

THE STATE OF NEW JERSEY, RESPONDENT, v. PETER J. RODGERS, PROSECUTOR.

Argued November 8, 1916—Decided February 21, 1917.

1. The legislature cannot deprive a man of his right to be indicted by a grand jury in case a charge of a crime at common law is made against him by enacting that his conduct shall make him a disorderly person punishable in a summary manner under the Disorderly Persons act.
2. The question whether the offence with which a man is charged is a crime at common law, cannot be made to depend on a mere matter of nomenclature. It depends on the real case presented.
3. One who, when "good and drunk," drives a large automobile on a public street of a city, and through the front window of a saloon, breaking the glass and framework of the window, and driving the front of his car to the front of the bar, is guilty of a public nuisance at common law.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *William A. Sumner*.For the defendant, *Josiah Stryker*.

The opinion of the court was delivered by

SWAYZE, J. This case should not be entitled *Rodgers v. Recorder of Paterson*. The writ is directed to the recorder as custodian of the record only. The case should be entitled, under rule 15, as it was before the recorder, "*State of New Jersey v. Peter J. Rodgers*."

Peter J. Rodgers was convicted by the recorder of being a disorderly person under chapter 67 of the laws of 1913. *Pamph. L.*, p. 103. The act provides that any person who operates an automobile, motor, or any other vehicle over any public street or highway while under the influence of intoxicating liquors shall upon conviction be punished by an imprisonment of not less than thirty days and not more than six

90 N. J. L.State v. Rodgers.

months. The act is one of an increasing class of acts whereby the legislature seeks to punish offences by summary proceedings, evidently with a design of avoiding trial by jury. That this can be accomplished in a certain class of cases is settled. *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145; *Riley v. Trenton*, 51 *Id.* 498. That it cannot be accomplished in another class of cases is also settled. *State v. Anderson*, 40 *Id.* 224; *Atlantic City v. Rollins*, 76 *Id.* 254. The recognized line of distinction is between offences indictable at common law and offences created by statute. In the present case, the statute is applicable to cases of both classes. One who operates an automobile or motor vehicle while under the influence of intoxicating liquor is almost sure to be guilty of a public nuisance, although it is conceivable that the vehicle might be of so low a power and weight and operated at so slow a speed that it could not be properly found to be a nuisance. On the other hand, one who operates (to use the word of the statute) an ox-cart while under the influence of intoxicating liquors would be within the words of the statute, but could hardly be called guilty of a public nuisance. Since the statute applies to offences that may not be a crime at common law, as well as offences that may be, we must look to the facts of the case to determine whether the present proceeding is an attempt to convict Rodgers of a crime without an indictment by a grand jury as required by the constitution or whether it is an attempt to convict him merely of disorderly conduct which may properly be done by summary proceedings before a magistrate. This question is not to be determined by the mere language of the statute. The legislature cannot, for instance, deprive a man of the constitutional safeguard when he is charged with larceny by authorizing his prosecution and imprisonment under the Disorderly act for a statutory conversion or a statutory stealing. *State v. Randall*, 53 *Id.* 485. The question of a man's constitutional rights cannot be made to depend on a mere matter of nomenclature. We must look at the real case that is presented.

The proof in this case is that the defendant drove his automobile through the front window of a saloon, breaking the

Trout v. Paul.

90 N. J. L.

glass and the wooden framework of the window, and drove the front part of the car to the front end of the bar in the saloon; that he was driving his car, which was a large automobile, that he seemed to be quite excited and was "good and drunk." We think this shows a case of public nuisance indictable at common law. A large automobile capable of doing what this one did, is an engine of such power that when driven on the public street by an intoxicated man, endangers life and limb of the public in general and is well within the definition of a public nuisance. The driver may be liable to conviction as well for manslaughter. *State v. Campbell*, 82 Conn. 671; 17 Anno. Cas. 236; *People v. Darragh*, 126 N. Y. Supp. 522; or for reckless driving, *Commonwealth v. Horsfall*, 213 Mass. 232; 100 N. E. Rep. 362; Anno. Cas. 1914, A. 682; or for assault and battery, *State v. Schutte*, 87 N. J. L. 15; *affirmed*, 88 *Id.* 396. Such conduct is quite as much a nuisance as the habitual sale of intoxicating liquor, as in *State v. Anderson*, cited above, and habitual Sunday sales, as in *Meyer v. State*, 41 *Id.* 6. Where the offence to the public is so serious the legislature could not have intended to minimize it to mere disorderly conduct, and the attempt to so treat it deprives the defendant of his constitutional rights.

The judgment must be reversed.

EMILY TROUT, PROSECUTOR, v. WILLIAM C. PAUL,
RESPONDENT.

Submitted December 7, 1916—Decided February 21, 1917.

The Orphans' Court has no jurisdiction to make an order for discovery of assets, upon the petition of an executor of a non-resident decedent, when letters testamentary have not been issued out of such court.

On *certiorari* to the Middlesex Orphans' Court.

Before Justices SWAYZE, MINTURN and KALISCH.

90 N. J. L.Trout v. Paul.

For the prosecutor, *Thomas Brown*.

For the defendant, *James S. Wight*.

The opinion of the court was delivered by

SWAYZE, J. William C. Paul is executor of Nettie Ray Paul, who died a resident of Pennsylvania. Letters testamentary were issued in Philadelphia, and an exemplified copy of the will and letters testamentary were filed with the register of the Prerogative Court. The executor thereupon petitioned the Middlesex Orphans' Court for an order requiring Emily Trout to appear and make discovery as to her possession or knowledge of the whereabouts or existence of any personal property of the decedent, and to produce the books, papers, securities and other personal property belonging to the estate. The petition also prayed that Trout be personally examined on the matter. The petitioner alleges, as the act of 1909 requires, his belief that Trout has in her possession property of the decedent. An order was made in accordance with the petition, and is brought here for review by *certiorari*. If the Orphans' Court had jurisdiction, *certiorari* is not the proper remedy. *Const.*, art. 6, § 4, ¶ 3. Since the Orphans' Court is a statutory court, the question must be solved by looking at the powers conferred by the statute. The only statute relied on or applicable is that of 1909. *Comp. Stat.*, p. 3866, pl. 139a. This gives jurisdiction only when the application is made to the Orphans' Court of the county in which letters testamentary or of administration were issued. No letters are averred or shown to have been issued in Middlesex county, and the Orphans' Court of that county had no jurisdiction. The filing of an exemplified copy of the will and letters testamentary with the register of the Prerogative Court is of no importance in the present case. The most that could accomplish would be to authorize the foreign executor to prosecute in courts of New Jersey having jurisdiction of the subject-matter; it cannot confer jurisdiction where none exists.

The order must be set aside, with costs.

Van Roden v. Strauss.

90 N. J. L.

JAMES VAN RODEN, FOR THE EAST RUTHERFORD FIREMEN'S RELIEF ASSOCIATION, RESPONDENT, v. MILTON D. STRAUSS, PROSECUTOR.

Submitted December 7, 1916—Decided February 21, 1917.

The act of 1885, requiring the payment of a percentage on premiums received by foreign fire insurance companies for the benefit of firemen's relief associations, does not authorize the Court of Common Pleas to impose the penalty or forfeiture therein provided for, or to enter a judgment for damages by summary proceedings.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *August C. Streitwolf*.

For the respondent, *Campbell & DeTurck*.

The opinion of the court was delivered by

SWAYZE, J. This is an extraordinary proceeding. Van Roden, as treasurer of the East Rutherford Firemen's Relief Association, petitioned the judge of the Bergen Pleas, under the act of 1885, to facilitate the collection from fire insurance companies of other states and from agents and brokers of certain premiums for the benevolent funds of duly incorporated firemen's relief associations. The petition charged in the alternative that Strauss had "failed, neglected or refused" to make a return to the petitioner of insurance placed by him in an English company; and had "failed, neglected or refused" to pay petitioner the two per cent. on each hundred dollars of premiums; and had in several other ways not specified "failed, neglected *and* refused" to comply with the provisions of the act; that by reason thereof the East Rutherford Firemen's Relief Association had been injured and damaged. The petitioner prayed an order requiring Strauss to produce in court all his books of account of business transacted by him

90 N. J. L.

Van Roden v. Strauss.

as agent or broker for insurance against fire upon property located in East Rutherford, in foreign insurance companies; and requiring him to make discovery as to all of his transactions as such agent or broker by the production of his property, effects, books, papers, documents, &c., or by examination of such persons or other witnesses as might have knowledge thereof; and take (evidently meaning that the court should take) such other proceedings by order or decree for the production of such books, records, or witnesses, and for the forfeiture and payment to the petitioner for the use of the relief association of such penalty as Strauss might be subject to or liable for, as to the judge might seem reasonable or just or the nature of the case might require.

Upon this petition the judge ordered Strauss to appear personally and produce for examination all his books of account of business transacted by him as agent or broker for insurance on property in East Rutherford, in foreign insurance companies, and to make discovery as to all of his transactions as such agent or broker by the production of his property, effects, books, papers, documents, &c., which relate to such transactions, or by the examination of such persons or other witnesses as might have knowledge thereof, and to abide the judgment and decree of the court in the premises.

After a hearing before the judge, an order was made which recited that Strauss had failed, neglected or refused (still in the alternative) to file with Van Roden a return of premiums; that Van Roden, as treasurer, was entitled to receive said report, and that the relief association was injured by the failure, neglect or refusal of Strauss to file the report; after these recitals it was ordered that Strauss forfeit and pay to Van Roden, as treasurer, \$500, and that a judgment for said amount be entered in favor of Van Roden, treasurer, against Strauss. Judgment was then entered for \$500 *damages*. The prosecutor seeks by *certiorari* to reverse this judgment because, among other reasons, it was arbitrary, unjust and unlawful.

It is suggested that *certiorari* is not the proper remedy, but, obviously, this proceeding was not according to the course

of the common law; it was more like a summary proceeding. Clearly, *certiorari* is the proper remedy. *East Orange v. Hussey*, 70 N. J. L. 244. The question has been recently dealt with by this court with ample citation of authority. *City Bank of Bayonne v. O'Mara*, 88 *Id.* 499. Since the proceeding is not according to the course of the common law, the only question is whether it is authorized by statute. The only statute is the act of 1885, above referred to, and the only provision therein that gives jurisdiction to the Common Pleas is in section 3. *Comp. Stat.*, p. 2446, pl. 459. The only authority conferred by that section is to compel the agent or broker to produce his books of account for examination by the court. It gives no power to compel the agent or broker to make discovery by the production of property, effects, papers and documents, or by the examination of the agent or other witnesses, or to adjudge a forfeiture, impose a penalty, or enter a judgment for damages. Section 4 provides for a forfeiture to the treasurer of the relief association of \$500 for each offence, but confers no power on the Common Pleas to ascertain the facts except as to a false return of business done; much less does it confer power to impose the forfeiture and to enter a judgment for damages. We need go no further, but it may be well to add that the order served upon Strauss, itself did not suggest to him that the court would undertake such arbitrary and unlawful action. No one reading the order and knowing the statute would suppose that it was meant to enter a personal judgment without pleadings, without an issue joined, and without a trial by jury; and a judgment for damages without evidence as to the amount.

It is unnecessary to discuss the very interesting and important question as to the right of the legislature to impose a tax for the benefit of a private corporation like the firemen's relief association.

Since the Common Pleas exceeded its jurisdiction, the judgment must be reversed. The prosecutor is entitled to costs.

90 N. J. L.

Woodbridge v. Keyes.

TOWNSHIP OF WOODBRIDGE, PROSECUTOR, v. ANDREW
KEYES, RESPONDENT.

Argued February 20, 1917—Decided April 7, 1917.

Section 27 of the Township act (*Comp. Stat.*, p. 5582) enacts that at the annual election at which appropriations for township purposes are voted upon, a majority of all votes cast shall be required to determine the amount of money to be raised for such purposes. At an election held for that purpose, votes were cast for two different amounts for each specified object, and neither amount, taken by itself, had either a majority of the voters who voted at the election, or a majority of the votes cast on the question of appropriations. *Held*, that the method of determining which sum was adopted, is to add all the affirmative and negative votes on both propositions to find the total vote, and, as no sum received a majority, if only the affirmative votes for each proposition are considered, yet, as it is clear that all who voted for the larger sum voted for the smaller sum and something more, the two affirmative votes should be added together and counted for the smaller sum.

On rule for *mandamus*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the rule, *J. H. Thayer Martin*.

Contra, *John A. Coan*.

The opinion of the court was delivered by

SWAYZE, J. This is a rule for a *mandamus* to compel the township clerk to set up a statement certifying that certain amounts were appropriated for specified objects of expenditure at the annual election. The difficulty arises from the fact that votes were cast for two different amounts for each specified object, and neither amount, taken by itself, had the votes of a majority of the voters who participated in the election, or a majority of the votes cast on the question of appropriation. The votes for an appropriation for police illustrate the point. Five hundred and seventy-five votes were cast for

Woodbridge v. Keyes.

90 N. J. L.

an appropriation of \$6,000, and one hundred and twenty against it. Three hundred and sixty-three votes were cast for an appropriation of \$8,500, and two hundred and eighty-six against it. Over one thousand four hundred votes in all were cast at the election. The applicant seeks to compel the clerk to certify that the \$8,500 appropriation carried.

The Township act (*Comp. Stat.*, p. 5582, § 27) enacts that a majority of all votes cast shall be required to determine an amount of money to be voted, granted or raised. Section 58 of the Election law of 1911 (*Pamph. L.*, p. 317) enacts that whenever any question or proposition is submitted, if the voter shall make an X mark opposite the word "yes," it shall be counted as a vote in favor of the proposition; if he marks opposite the word "no," it shall be counted as a vote against the proposition; and in case no mark shall be made after either word, it shall not be counted as a vote either for or against such proposition. From this provision the relator asks us to draw the conclusion that the votes of those who did not vote on the larger sum cannot be counted for or against it; and as the larger sum had more votes for than against, it is said to have carried. The difficulty with the argument is that it proves too much; for it proves also that the smaller appropriation carried. In fact the argument is stronger for the smaller sum, since in each case, except the appropriation for the poor, there were more affirmative votes for the smaller than for the larger sums, and in the case of the appropriation for the poor there was a tie. We think this proposed solution of the difficulty is out of the question.

If we look at the facts as disclosed by the returns, we think the total vote cast on appropriations may fairly be ascertained by adding all the affirmative and negative votes on both propositions. It is true that some of the negative votes, on one proposition may have been affirmative on the alternative proposition and may thus be counted twice in ascertaining the total. Fortunately, this chance of error is not enough to throw doubt on the result in the present case. Taking this total as our basis, no appropriation received a majority of all votes cast if only the affirmative votes for the particular

90 N. J. L. American Woolen Co. v. Edwards, Comptroller.

amount are considered; but that would be too narrow and mechanical a view. When we consider the intent of the voters, it is clear that all who voted in the affirmative, whether on the smaller or larger sums, voted for some appropriation; those who voted for the larger sum voted for the smaller sum and something more; those who voted for the smaller sum voted for that and no more. We do no violence to the intent of the voters by adding the two affirmative votes and counting the total for the smaller sums. We would do violence to the intent of the voters by taking another course. Adding the affirmative votes, we find a majority of the votes cast were in favor of or were content with the smaller sum. At any rate it is clear that a majority was not in favor of the larger amount; and that is all we need now decide. The *mandamus* must be denied.

AMERICAN WOOLEN COMPANY v. EDWARD I. EDWARDS,
COMPTROLLER, AND THOMAS F. MARTIN, SECRETARY.

Argued July 15, 1916—Decided July 27, 1916.

1. Under the supplement to the act concerning corporations, approved March 23d, 1900 (*Pamph. L.*, p. 316; *Comp. Stat.*, p. 1620, § 31a), no corporation organized under the laws of this state can be dissolved until all taxes levied upon or assessed against the corporation by the state shall have been paid. The connection of the words "levied" and "assessed," by the conjunctive "or," indicate that two different acts were meant, therefore, taxes levied, although not yet assessed, must be paid before the corporation can be dissolved.
2. The annual corporation license fee or corporation tax cannot be said to be assessed until the state board has ascertained the amount of the tax and certified it to the comptroller, pursuant to *Comp. Stat.*, p. 5291, pl. 505.
3. Where words used in a statute have been interpreted by the Supreme Court of the state more than two years before the passage of the act, the words so used must be assumed to have been used with the judicial definition in mind.
4. The corporation license fee, or franchise tax, provided for in *Comp. Stat.*, p. 5288, pl. 504, is called by the legislature an annual license fee, which suggests a payment in advance. Under

American Woolen Co. v. Edwards, Comptroller. 90 N. J. L.

- the statute, the levy is completed and the year for which the tax is paid begins on the first Tuesday in May, that being the date fixed for the return by the corporation to the state board, which latter body has merely to calculate the amount of the tax based upon such return, except where the corporation neglects or refuses to make a return.
5. Upon the dissolution of a corporation, the secretary of state is not required to issue a certificate of dissolution unless the certificate of the comptroller that the state taxes have been paid has been filed with him, pursuant to the provisions of the act of 1900 (*Comp. Stat.*, p. 1620, § 31a).

On *mandamus*, return and plea thereto.

Before Justice SWAYZE, sitting for the court by consent of counsel.

For the relator, *Lindabury, Depue & Faulks*.

For the comptroller and the secretary of state, *John W. Wescott*, attorney-general.

SWAYZE, J. I am somewhat embarrassed by the form of the issues arising on the plea, but inasmuch as the case was argued by counsel on the substantial merits, and it was stipulated that the facts be tried before me without a jury, I disregard the various issues raised by the plea. The real issue is whether all taxes levied upon or assessed against the relator by the State of New Jersey in accordance with the Corporation Tax act of 1884 were fully paid. I find that they were not. I base this finding upon my construction of the act to be hereafter stated. Before I deal with the main question, I may premise that I attribute no force to the action of the secretary of the board at the time the relator demanded the certificate of the comptroller, nor to the action of the members of the state board or to the board itself thereafter. Unless the refusal of the comptroller to issue the certificate was justified by the situation at the very instant of the demand by the relator, I think it cannot be justified by what happened thereafter

90 N. J. L. American Woolen Co. v. Edwards, Comptroller.

The real question in the case is whether the tax was levied or assessed at the time the relator made its demand on the comptroller for a certificate that the taxes were paid. The statute to be construed is the act of 1900. *Pamph. L.*, p. 316; *Comp. Stat.*, p. 1620, pl. 31a. It enacts that no corporation shall be dissolved by its stockholders until all taxes levied upon or assessed against such corporation shall have been fully paid. Two situations were contemplated by the legislature, one where taxes had been levied, and another where they had actually been assessed. I think it clear that these taxes cannot be said to be assessed until the state board has acted, ascertained the amount and certified it to the comptroller, pursuant to section 5 of the act. *Comp. Stat.*, p. 5291, pl. 505. I have with some hesitation reached the conclusion that the taxes may, within the contemplation of the legislature at the time of the act of 1900, be said to have been levied before the assessment. The use of both words, "levied" and "assessed," connected by the conjunction *or* indicates that two different acts were meant; otherwise, the word "assessed" alone would have sufficed. Although levied and assessed are not always used in our statutes with nice distinction as to the difference of meaning, and the conjunction *or* might conceivably be used to connect synonymous words, I think that construction is not permissible in the present case. A little more than two years before the act of 1900 was passed, the Court of Errors and Appeals, in the very important case of *Township of Bernards v. Allen*, 61 N. J. L. 228, 238, had sharply drawn attention to the distinction between the levy and the assessment of taxes, and had said that the levy was a legislative function, the assessment mere machinery to effectuate the legislative purpose. We must assume that thereafter the words were used in our statutes with this judicial definition in view. It is notable that the statutes cited in the relator's brief all antedate the decision in *Township of Bernards v. Allen*. The latest, that of 1897 (*Comp. Stat.*, p. 5293, pl. 510), itself seems to make a distinction between the levy and assessment and originally required the appeal to be

American Woolen Co. v. Edwards, Comptroller. 90 N. J. L.

made within three months from the latter only, a limitation now extended to four months. *Pamph. L.* 1916, p. 25.

These considerations, however, are far from conclusive, since it may well be contended that there is no levy until the amount is ascertained (*Hohenstatt v. Bridgeton*, 62 N. J. L. 169), and the real question for solution is when the levy may be said to be completed. In determining this question, the important consideration is that the payment required of the corporation is called by the legislature an annual license fee. *Comp. Stat.*, p. 5288, pl. 504. The word "annual" points to a year, and following the analogy of the act relative to statutes (*Comp. Stat.*, p. 4973, pl. 10), perhaps a calendar year. Calling it a license fee suggests a payment in advance, since a government which seeks to derive a revenue from license fees, naturally makes the payment of this fee a condition precedent. The statute does not, however, require payment in advance at the beginning of the year, but only in June after the ascertainment of the amount. By analogy to the rule as to property taxes, this would indicate that the liability to payment depends on the situation at the time the amount is certified to the comptroller. *Jersey City v. Montville*, 84 N. J. L. 43; *affirmed*, 85 *Id.* 372. The argument is a strong one, and I should be inclined to accede to it, but for the fact that I cannot believe that the legislature meant to leave open the door for a corporation to do business for five months of the calendar year without liability to the license tax—yet that would be the result since there is no provision for apportionment. The legislature by enacting the act of 1900 evinced a design to save the state against possible loss of these license fees or taxes that might arise from dissolution during the year. I ought not to adopt a construction that would often thwart that intent.

I have said that the word "annual," in connection with these license fees by analogy with the statutory construction of the word "year," perhaps points to a calendar year. Other considerations lead me to think that is not the proper construction. When the act was originally passed no date was fixed as that on which the capital stock was to form the basis

90 N. J. L. American Woolen Co. v. Edwards, Comptroller.

of the tax. This court held that the date must be that on which the statute took effect—April 18th. We said that the 18th day of April in each year marks the beginning of the yearly period for which the fee or tax is charged, and the day on which the amount of the capital stock must be taken to form the basis of computation. *Brewing Improvement Co. v. Board of Assessors*, 65 N. J. L. 466. Subsequently, the omission in the original act was supplied, and the 1st day of January preceding was fixed as the time when the amount of the capital stock should be ascertained; and the first Tuesday of May fixed as the time for the annual return. *Pamph. L.* 1901, p. 31; *Pamph. L.* 1906, p. 31; *Comp. Stat.*, p. 5295, pl. 519. The act of 1901 (the amendment of 1906 is unimportant for the present purpose) came before the court in *Hardin v. Morgan, Comptroller*, 70 N. J. L. 484; *affirmed*, 71 *Id.* 342, and it was held that the first Tuesday of May took the place of April 18th. I incline, therefore, to hold that the year for which the license fee is paid begins with the first Tuesday in May. On that day it is in most cases easy to ascertain by a mere arithmetical calculation the amount of the license fee or franchise tax, at the rate fixed by the legislature, and I see no difficulty in holding that the levy is made as of that date. The statute does not contemplate anything more than a mere calculation by the state board except in cases where the corporation neglects or refuses to make a return. Section 3 of the act (*Comp. Stat.*, p. 5287, pl. 503) authorizes the board to fix the amount only in that case. Section 5 (*Comp. Stat.*, p. 5291, pl. 505) makes a distinction between cases where the company makes a return and cases where the board ascertains the facts. It requires the board to certify and report to the comptroller a statement of the basis of the annual license fee or franchise tax (1) as returned by each company or (2) ascertained by the board. There seems to be no provision for a review by the board where the company has made a return. Probably, the penalty of perjury as provided by section 3 was considered sufficient to secure an honest return.

American Woolen Co. v. Edwards, Comptroller. 90 N. J. L.

There is an obvious advantage in adopting the first Tuesday of May as the beginning of the year for which the license fee is paid. It reduces to a single month the time between the date of the return and the date when the tax becomes payable, and assimilates the tax year in the case of miscellaneous corporations to the tax year in the case of other corporations under section 2 (*Comp. Stat.*, p. 5287, pl. 502), and in a sense to the time of assessment of general property taxes. The obvious advantage would be of no weight if clear language to the contrary were used in the statute; but when we are seeking for the legislative meaning, it has weight.

It was urged that the decision in *State v. United New Jersey Railroad and Canal Co.*, 76 N. J. L. 72, supports the relator. But the construction of the word "imposed," in that case, depended upon the peculiar facts of the case and the certainty that the legislature meant the payment of taxes by the railroad company to be continuous. The reasoning was similar to the reasoning adopted in this opinion.

There must be judgment for the defendant.

As the case may be taken to the Court of Errors and Appeals, I ought to call attention to two clerical errors. The writ refers to section 152 of the Corporation act of 1896. There is no such section. The reference should be to the act of 1900, which is printed in the compiled statutes as *placitum* 31a of the Corporation act. I imagine the error may have arisen from using one of the compilations of the Corporation act where arbitrary numbers are given to sections taken from different acts. In the return the secretary of state justifies under chapter 254 of the laws of 1893. This was repealed by the Corporation act of 1896. These errors should be amended. Whether counsel will think it desirable to amend the plea so as to present a single issue is a question for them to determine.

If I had reached the conclusion that the merits were with the relator, I should have had difficulty in seeing how a *mandamus* could go against the secretary of state. He was not required to issue a certificate of dissolution unless the certificate of the comptroller was filed with him.

90 N. J. L.Penna. R. R. Co. v. Townsend.

PENNSYLVANIA RAILROAD COMPANY, APPELLANT, v.
WILLIAM A. TOWNSEND, RESPONDENT.

Submitted December 7, 1916—Decided March 27, 1917.

1. *Prima facie*, the consignor of freight who contracts with the carrier for its shipment, is liable to pay the charges of transportation, and the mere fact that the charges are left unpaid by the consignor and are to be collected from the consignee at destination, does not discharge the consignor from liability to the carrier.
2. The term "consignee" when used in a bill of lading means the person named in the bill as the person to whom delivery of the goods is to be made.
3. The mere existence of the relation of carrier and consignee is not enough to establish a liability of the latter to pay freight charges. There must be an agreement by the consignee, express or implied, in order to create such a liability.
4. If the assignee of a bill of lading accepts and removes goods at their destination without paying the charges, with knowledge that the carrier is giving up for his benefit a lien thereon for a stated amount, that would be cogent evidence from which to imply an agreement on his part to pay the known amount of the freight charges.
5. The mere acceptance and removal of goods at their destination by the assignee of a bill of lading, and the payment by him of the freight bill as made out by the carrier, without knowledge by the assignee that the same was an undercharge, does not create any further liability on the part of such assignee, even though, by mistake of the carrier, the bill as rendered did not include the entire charge.

On appeal from the Burlington Common Pleas Court.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the appellant, *Gaskill & Gaskill*.For the respondent, *George M. Hillman*.

The opinion of the court was delivered by

TRENCHARD, J. The Bangor and Aroostook Railroad Company, a common carrier of freight, accepted at Presque Isle

station, Maine, a shipment of potatoes from T. M. Hoyt, "consigned to the order of T. M. Hoyt, Columbus, N. J. Notify Wm. A. Townsend," as appears from the bill of lading.

That company and the New York, New Haven and Hartford Railroad Company and the Pennsylvania Railroad Company transported the potatoes to Columbus, New Jersey, and the Pennsylvania Railroad Company there delivered them to William M. Townsend upon his payment to the company of freight charges of \$101.45.

This suit was brought by the Pennsylvania Railroad Company against Townsend to recover the sum of \$40, the complaint averring that the freight charges were incorrectly calculated by the plaintiff at \$101.45, and that the true amount thereof was \$141.45.

At the trial the judge nonsuited the plaintiff.

We are of the opinion that the nonsuit was right.

Prima facie, the consignor of freight who contracts with the carrier for its shipment is liable to pay the charges of transportation, and the mere fact that the charges are left unpaid by the consignor, and are to be collected from the consignee at destination, does not discharge the consignor from liability to the carrier. *Central Railroad Co. v. MacCartney*, 68 N. J. L. 165; *Grant v. Wood*, 21 Id. 292.

In the present case, the plaintiff company has not seen fit to sue the consignor, but rather has sued the defendant upon the theory, apparently, that he was the consignee, and seeks to hold him as such under the provision of the bill of lading upon which the freight in question was shipped that "the owner or consignee shall pay the freight."

But the defendant, Townsend, was not the "consignee." The term "consignee" means the person named in the bill as the person to whom delivery of the goods is to be made. *Pamph. L.* 1913, p. 261. By the bill in question the goods were "consigned to the order of T. M. Hoyt."

Moreover, the mere existence of the relation of carrier and consignee is not enough to establish a liability of the latter to pay freight charges. There must be an agreement by the

90 N. J. L.

Penna. R. R. Co. v. Townsend.

consignee, express or implied, in order to create such a liability. *Central Railroad Co. v. MacCartney, supra.*

The plaintiff company seemingly recognized these rules, and, accordingly, in its complaint, expressly charged that the defendant, Townsend, agreed to pay the freight charges.

But at the trial no testimony was offered tending to show any such contract or undertaking. The plaintiff produced but one witness who testified only concerning freight rates. The only other proof in the case was the bill of lading endorsed "Smith & Hoyt" and "W. A. Townsend," and the admission of the defendant, Townsend, that the plaintiff company delivered the shipment to him upon his payment of the freight charges demanded amounting to \$101.45.

There was no evidence showing by whom the endorsement "Smith & Hoyt" was made, nor anything showing any connection between "Smith & Hoyt" and "T. M. Hoyt," the consignee.

In this state of the proof the plaintiff company asserted, and now asserts, that "the only question which could arise was, What is the lawful rate?" We think not.

We have pointed out that the consignee was T. M. Hoyt, and that the bill of lading was not endorsed or assigned by him. But if we were to assume that the bill of lading was regularly assigned to Townsend, the defendant, that assumption would not help the plaintiff. There is no proof, apart from the bill of lading, as to the relation existing between the consignor and Townsend, the defendant, nor as to the relation of Townsend to the goods, nor that he knew the correct amount of the freight charges, nor that he had even made any agreement respecting the same. We have only the bare fact that a statement of the freight charges prepared by the plaintiff was delivered to Townsend, who paid the bill and took the goods.

No doubt, if Townsend, as assignee of the bill of lading, had accepted and removed the goods without paying the charges, with knowledge that the carrier was giving up for his benefit a lien upon the goods for a stated amount—that would be cogent evidence from which to imply an agreement on his part to pay the known amount of the freight charges.

State v. Frank.90 N. J. L.

But, the mere acceptance and removal of goods by the assignee of a bill of lading, upon payment of the freight bill as made out by the carrier, without knowledge by the assignee that the same was an undercharge, does not create any further liability on his part, even though, by mistake of the carrier, the bill as rendered did not include the entire charge. *Central Railroad Co. v. MacCartney, supra*; *Erie Railroad Co. v. Wanague Lumber Co.*, 75 N. J. L. 878; *Pennsylvania Railroad Co. v. Titus*, 156 App. Div. 830; 142 N. Y. Supp. 43.

The reason is that the consignee's liability for freight charges depends not upon any duty resting upon him as consignee, but upon agreement or undertaking by him, and that his acceptance of the goods bound him to pay only the rate specified in the freight bill delivered to him at the time the goods were accepted—and the liability of the assignee of the bill of lading is no greater.

The judgment of the court below will be affirmed, with costs.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
ROBERT FRANK, ALIAS "BOBBIE," PLAINTIFF IN
ERROR.

Submitted December 7, 1916—Decided March 27, 1917.

1. On a prosecution for keeping a disorderly house, evidence of acts and conduct upon the part of the defendant tending to show that he was occupying the house and using it as his own, and exercising the same control over it that men usually have over their own houses, is sufficient to authorize the jury to find that he kept the house.
2. On a prosecution for keeping a disorderly house, evidence that the defendant exhibited at his house a chart showing horses' names, where running, and the odds that he laid against them; that his patrons there present delivered to him the money which they bet, together with slips recording their names, the horses' names, and the odds; and that when his patrons won the defendant paid the winnings, is sufficient to justify the jury in

90 N. J. L.

State v. Frank.

- finding that betting upon horse racing was carried on, even though there was no more definite proof that the races had been actually run.
3. On a prosecution for keeping a disorderly house, testimony given by detectives in the employ of the state that bets on horse races were made by them, and by others in their presence, with the defendant at his house, was competent evidence, its weight and credibility being for the jury to determine.
 4. Although certain sentences in a charge, taken alone, need some amplification to render them accurate, yet if such amplification be given in the context, so that the jury cannot be misled, there is no error justifying reversal.
 5. On a prosecution for keeping a disorderly house, the state asked a witness, "Do you know where this defendant's place is?" Against the defendant's objection, the judge directed the witness to answer "yes or no." The witness answered "Yes." Then without any further objection the state asked "Where?" and the witness answered "800 Park avenue, Hoboken," and gave testimony as to the presence, acts and conduct of the defendant there (no part of which defendant denied), from which the jury could and did find that the defendant kept the house. *Held*, that even if the question objected to was improper, it could not have prejudiced the defendant in maintaining his defence upon the merits, and so should not result in a reversal.
 6. Upon trial of an indictment, where the defendant fails to testify in his own behalf to deny inculpatory facts, which if false he must know to be so, it is proper for the trial judge to call attention to his failure to testify.

On writ of error to the Hudson Quarter Sessions.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the plaintiff in error, *Harlan Besson*.

For the defendant in error, *Robert S. Hudspeth*, prosecutor of the pleas, and *George T. Vickers*, assistant prosecutor of the pleas.

The opinion of the court was delivered by

TRENCHARD, J. The plaintiff in error was convicted in the Hudson Quarter Sessions on an indictment charging him with maintaining a disorderly house.

The indictment charged, among other disorderly acts within the defendant's house, "betting, staking and wagering certain large sums of money on the competitive running or racing of horses," and at the trial the testimony was mainly directed to proving that charge.

We have considered every assignment of error argued by the defendant and find none requiring reversal.

The defendant contends that a verdict should have been directed in his favor.

This contention is based, first, upon the assertion that there was no evidence that the defendant kept the place in question.

We think there was evidence tending to show that fact. Several witnesses testified to acts and conduct upon the part of the defendant tending to show that he was occupying the house, and using it as his own, and exercising the same control over it that men usually have over their own houses—and that was sufficient to authorize the jury to find that he kept the house.

The argument in favor of a directed verdict is also based upon the proposition that there was no proof that any bets were there made upon horse races.

We think this also is not well founded. There was evidence that the defendant exhibited a chart containing the names of the horses, where running, and the odds which he laid against them; that his patrons there present delivered to him the money which they bet, together with slips recording their names, the horses' names and the odds; that when his patrons won the defendant paid the winnings. Such evidence tended to support the charge of the indictment that the illegal practice of betting upon the racing of horses was carried on, even though there was no more definite proof that the races had been actually run. *Ames v. Kirby*, 71 N. J. L. 442.

It is further contended that there could be no conviction because the only evidence supporting it was given by detectives in the employ of the state, who testified that bets on horse races were made by them, and by others in their presence, with the defendant at his house.

90 N. J. L.State v. Frank.

But we think such evidence entirely competent, its weight and credibility, of course, being for the jury to determine.

There is no merit in the contention that the trial judge "incorrectly instructed the jury as to the meaning of the crime 'disorderly house' and the *quantum* of proof required to convict the defendant of being the keeper thereof."

In support of this complaint the defendant lays hold of certain sentences of the charge and says that therein the judge did not point out that it was necessary in order to convict that the jury must find that the defendant *knowingly and habitually* permitted men to assemble there and bet on horse races. But that is no ground for reversal when we consider other parts of the charge. Both before and after the sentences referred to, the judge repeatedly instructed the jury, in effect, that to convict it was essential to find that the defendant *knowingly and habitually* permitted men to assemble in his place for the purpose of betting money on the racing of horses. The rule is, that although certain sentences in a charge, taken alone, need some amplification to render them accurate, yet if such amplification be given in the context, so that the jury cannot be misled, there is no error justifying reversal.

It is next said that the trial judge erred in allowing the prosecutor of the pleas to ask a witness called by him this question: "Do you know where this defendant's place is?" The defendant objected upon the ground that "it has not been established that it was this defendant's place; it includes an assumption that he owned and conducted some place." The judge directed the witness to answer "yes or no." The witness answered "yes." Then, without any further objection, the prosecutor asked "Where?" and the witness answered "800 Park avenue, Hoboken," and in answer to further questions gave testimony as to the presence, acts and conduct of the defendant there (no part of which the defendant denied) from which the jury could, and did, find that the defendant kept and controlled the place. Our conclusion is, that even if the question objected to was improper (which we do not decide), it could not have prejudiced the defendant in maintaining

Rowland v. Mercer Co. Traction Co.

90 N. J. L.

his defence upon the merits, and so should not result in a reversal.

It is argued that the judge erred in calling attention to the defendant's failure to testify. Not so. Numerous witnesses testified that the defendant was present in the house where the gambling was carried on; that he had charge of the gambling instrumentalities, and personally took the money, kept the records and paid the winnings to his patrons. These were inculpatory facts which, if false, he knew to be so, and his failure to testify in his own behalf in denial of them, rendered it proper for the trial judge to call attention to his failure to testify. *State v. Callahan*, 77 N. J. L. 685.

The judgment below will be affirmed.

ALEXANDER C. ROWLAND ET AL., TRUSTEES, ETC..
PROSECUTORS, v. MERCER COUNTY TRACTION COM
PANY, DEFENDANT.

Argued November 10, 1916—Decided February 20, 1917.

1. In a proceeding for the taking of lands under the Eminent Domain act, the omission as parties of owners of land in whose favor an easement of way exists across the land to be taken, will not entitle the general owner to have the order for appointment of commissioners set aside.
2. Under the Street Railway act of 1893 (*Comp. Stat.*, p. 5021), the necessity for the taking of lands exists when it appears that they are required for a route lawfully filed, and otherwise complying with the statute.
3. The fact that the taking is in pursuance of a general project, involving with the creation of new highways in a municipality the removal of a railroad terminal and trolley terminal, so as to connect detached sections of a university campus, does not deprive the improvement of its public character.
4. The change of a trolley terminus to a new site, and its connection with the existing line at a convenient point, involves the building of a new line in a sense covered by sections 6 and 13 of the Street Railway act of 1893.

90 N. J. L.Rowland v. Mercer Co. Traction Co.

On *certiorari*.

Before Justices GARRISON, PARKER and BERGEN.

For the prosecutors, *Julian C. Harrison*.

For the defendant, *Edward M. Hunt*.

The opinion of the court was delivered by

PARKER, J. The attack is upon an order of a justice of this court appointing commissioners under the Eminent Domain act (*Comp. Stat.*, p. 2181; *Pamph. L.* 1900, p. 79) to value certain lands in Princeton, of which prosecutors hold the fee as trustees under the will of Andrew L. Rowland, deceased. The traction company desires to acquire the lands in question for use as a terminal in lieu of its present terminal which adjoins the tracks of the Pennsylvania Railroad Company some three hundred feet to the eastward.

The first point made by prosecutors is that the petition is on its face insufficient, in that it fails to state the names and residences of all the persons contemplated by the statute as parties to the proceeding. Section 2 says it "shall set forth the names of the owner and occupant, if any there be, and of the persons appearing of record to have any interest in said property." The petition names certain persons as being "the owners and occupants of and the persons interested in said land and premises." We are unable to see that the difference is more than formal. But if we are in error, then the petition goes further, substantially, than the act requires, for persons appearing of record to have an interest may in fact have none, whereas the petition purports to include all having an interest whether the same appear of record or not. This is curable by amendment, if necessary, under section 17, and plainly should not vitiate the proceedings.

But it is further claimed that in fact the petition omits the owners of easements of way over a portion of the premises, and that for this reason the order should be set aside. We do not think the fact appears very clearly by the proofs taken,

Rowland v. Mercer Co. Traction Co.90 N. J. L.

but, assuming it established, the objection is not one which affects the prosecutors adversely; for, on the face of the proceedings, the land is taken as an unincumbered fee, and if this be paid for, as it must be, and if the easement holders are entitled to a share of the award and insist on being paid that share, this will not deprive prosecutors of anything to which they themselves are entitled. See *Bright v. Platt*, 32 N. J. Eq. 362. The fact that such easement holders are not now brought in, and in the present state of the record have no opportunity to produce evidence as to the total value of the property, which is all that is now in question (*Herr v. Board of Education*, 82 N. J. L. 610), is nothing of which prosecutors can legally complain. Indeed, the easement holders might bring their action after the award and irrespective of it; in which case prosecutors would receive the award undiminished by their claim for a share of it. The company simply proceeds at its peril as to omitted claimants. *National Railway Co. v. E. & A. Railroad Co.*, 36 *Id.* 181. The petitioner might have asked that the award be made subject to the easements, as is often done in similar proceedings when a restricted use is contemplated. *National Docks Co. v. United Companies*, 53 *Id.* 217, 222, and cases cited. That it has elected to take the rights of prosecutors as a fee unincumbered by easements cannot injure prosecutors. And, if need be, as we have already said, the petition and proceedings can be amended to bring in these omitted parties, and no doubt would be so amended on their application, as they are manifestly entitled to be heard on the gross valuation. But their omission constitutes no valid ground to set aside the proceedings at the instance of the general owners.

The next point is that no public necessity exists for the taking of these lands. The general "necessity" for the taking of lands required for the route of a street railway company incorporated under the act of 1893 (*Comp. Stat.*, p. 5021) has been determined by the legislature, which has, in effect, said that the public necessity exists whenever the land in question is necessary for the construction of any railway built under the provisions of the act, either as an extension of the

90 N. J. L.

Rowland v. Mercer Co. Traction Co.

line of an existing railway or a new line not exceeding sixty feet in width * * * or as may be required for the locating and constructing all necessary works, &c. Section 13. The land desired nowhere exceeds the statutory width; and, as it is not denied that the company is lawfully organized with the powers conferred by the statute, it follows that if it be building either an extension or a new line, and the land is necessary for its construction, the legislative policy is satisfied. No bounds appear to have been set by the legislature to the location of such new line or extension, except the requirement that the survey and location shall be filed in a designated public office, and the permission of the municipality shall have been obtained. Granted the legality of the survey and location now under consideration, the necessity of the land to permit construction follows, as of course.

Assuming, however, that the public "necessity" of the construction of this new terminus in lieu of the present one, is a matter of judicial consideration, as in *Easton and Amboy Railroad v. Greenwich*, 25 N. J. Eq. 565, and that we are to determine this question on the evidence, we proceed to examine it, with the reservation that the phrase "public necessity," if used at all, must be considered as equivalent to "public benefit" or "public use." Passing to the facts, we find that by co-operation of the authorities of Princeton University, a great seat of learning which is the principal feature of Princeton; of the municipal government; of the Pennsylvania Railroad Company, whose local terminal property adjoins the present terminal of defendant; and of the defendant company, a general revision of the municipal plan of streets and highways in this section of the town is projected, with the object of connecting the extensive and unbroken college campus, lying east of the present railroad terminal, and which is one of the chief attractions of the university, with the ample grounds of the graduate college, another part of the same university, on the west. At the same time several new streets are to be opened to public use; the new arrangement will remove the railroad and trolley terminal from unnecessary proximity to one of the principal dormitories of the university.

facilitate direct communication between the graduate school and college campus without crossing railroad tracks and beautify a part of the town which heretofore has been more or less unsightly. All this, as appears by the evidence, has been made financially possible by liberal gifts from generous benefactors of the university who no doubt were largely prompted by consideration of its welfare, but whose liberality plainly enures in great measure to the public good. Under the circumstances, we think it would be quite unreasonable to hold that the change of terminal of defendant, which is an essential part of the scheme, is not a public benefit. On the contrary, we are satisfied that such benefit will necessarily result.

Prosecutors next argue that the proposed change of terminus is not within the letter of the statute. The act, by section 6, gives power to "build any new line of railway," and, by section 6, to take land necessary therefor. The length of such "new line," either maximum or minimum, is not specified, nor whether it is to be a main line, branch or a spur. We think it plain that this change of the terminal by abandonment of some one thousand two hundred feet of original line and location of about eight hundred feet of line in another place, involves the building of a new line in a sense covered by the statute. See *Morris and Essex Railroad Co. v. Central Railroad Co.*, 31 N. J. L. 205.

The fourth point, alleging violation of the constitutional rights of prosecutors, rests either on assumptions of fact contrary to our findings, as outlined above; or on the proposition that the taking is, in effect, that of the benefactors of the college and not that of the street railway company. It is, no doubt, true that the proposed change of terminal was suggested by those benefactors; but if it is a legitimate public improvement, as we have held that it is, the fact that it is undertaken at the suggestion of parties moved by other considerations will not destroy its public character nor deprive it of the statutory support.

The writ of *certiorari* will be dismissed, with costs.

90 N. J. L.Heilemann v. Clowney.

HENRY H. HEILEMANN, PLAINTIFF, v. HANNAH M.
CLOWNEY, DEFENDANT.

Argued November 10, 1916—Decided February 20, 1917.

1. A return that a summons was served by leaving it at defendant's "residence" is insufficient.
2. A summons is not lawfully served by slipping a copy thereof under the locked entrance door of a building leading into a hall, which is used to communicate both with a business establishment and a stairway to defendant's suite of apartments, shut off by its own entrance door.
3. Whether such summons could be lawfully served by delivery to defendant's son, living with her in said apartment and about to enter the building from the street, *quære*.
4. The abolition of a return day in the summons brought about by the Practice act of 1912, and the requirement that summons shall be served "forthwith" (*Pamph. L.* 1912, p. 468), have done away with the practice of enlarging the return day in cases when prompt service cannot be made or defective service has been made; but have not deprived plaintiffs of the right to have lawful service made on defendants on the same principles that led to an extension of the return day under the former practice.

On rule to show cause why service of summons should not be set aside and cross-motion to permit issue and service of new summons.

Before Justices GARRISON, PARKER and BERGEN.

For the plaintiff, *Garrison & Voorhees*.

For the defendant, *Clarence L. Cole* (*Lee F. Washington* on the brief).

The opinion of the court was delivered by

PARKER, J. The requirement of the statute of 1903 was that a copy of the summons "shall be served on the defendant in person at least two days before its return or left at his usual place of abode at least six days before its return." *Practice act* 1903, § 52; *Comp. Stat.*, p. 4067. By an amendment

Heilemann v. Clowney.

90 N. J. L.

of 1912 (*Pamph. L.*, p. 468), no doubt, in view of the Practice act of that year, and the rules and forms accompanying the same, wherein return days are eliminated from writs of summons, the words "at least two (or six) days before its return" are struck out, and the clause reads: "A copy whereof shall be served on the defendant in person, or left at his usual place of abode. Said service shall be made forthwith after the process is delivered to the sheriff or other officer for service." No personal service was made and the question is whether there was valid substituted service.

The points made by defendant are these:

1. That the return fails to state that service was made "at" the defendant's "usual place of abode."
2. That such service was not in fact made.
3. That return was not made within legal time.

The testimony shows that at the time of the attempted service defendant lived at 167 St. James Place, Atlantic City, in a building which has a business front on the elevated boardwalk, and an entrance door opening on an inclined ramp leading from the street level of St. James Place to the boardwalk. The basement of the building, on the street level, was used as a workshop and storeroom by a rolling chair concern; the main floor, opening on the boardwalk and the ramp, as the place of business of the same concern; and the floor above, reached by the doorway on St. James Place through a hall connecting with the rolling chair office and up a stairway separate from the rolling chair office, as the living apartments of the defendant and her family. No one else lived in the building. The evidence satisfies us that this apartment was her "usual place of abode" in the contemplation of the statute. She had no other place of abode, although at this period much of her time was spent at a local hospital in attendance on a sick son. At the time when the sheriff's deputy appeared with the summons, there was no one in the living apartments, and the side door on St. James Place was locked. Another son of defendant, named Frank Clowney, who had just finished bathing in the ocean, was returning to the apartment in his wet bathing clothes when the sheriff's officer, learning his

90 N. J. L.Heilemann v. Clowney.

identity, asked for his mother and was told she was not at home. The officer tried to hand Clowney the papers outside the building, but he refused them, and the officer put the papers under the side door opening on the ramp. Clowney, according to his testimony, tried to enter by that door after the officer had gone, and found it locked. No one answering the bell, he obtained access through the basement and thence to the hall and so upstairs. Later on he picked up the paper and gave it to his mother's attorney without showing it to her.

The return was not made until over a month after the attempted service, and several days after the depositions were taken under this rule. It reads as follows:

"Duly served within summons and complaint August 21st, 1916, on the defendant, Hannah M. Clowney, at 167 St. James Place, Atlantic City, New Jersey, the defendant locking herself in the house, and refused to receive the writ, and the son, who is above the age of fourteen, also refusing to receive the writ, I placed a copy under the door, in the presence of the said son; the place service was made was the residence of the defendant at the time service was made."

It is quite clear that the return is defective in failing to state that service was made at defendant's usual place of abode. *Mygatt v. Coe*, 63 N. J. L. 510.

Assuming that the return may be amended to conform to the facts, the question whether service was actually made "at" defendant's "usual place of abode" presents more difficulty. The point mainly urged is that the word "at" is not satisfied by placing the writ under the locked entrance door of a hallway leading either to a business establishment on the one hand, or, on the other, to a stairway in turn leading to defendant's apartment which had its own door, also locked. If the building had contained several apartments, occupied by several families, and the writ had been slipped under the front door of a common hallway, it could not be claimed that effective service was made; nor in all probability if it were handed to an attendant at the general entrance. *Fitzgerald v. Salentine*, 10 Met. 436. In the case at bar, the writ might

well have been picked up by some employe of the rolling chair concern using that doorway, and never have reached its destination at all. We think the point is well taken.

In so ruling, we do not wish to be understood as sanctioning the practice of slipping a writ under a door, or tossing it into an open window, or otherwise physically "leaving" it at defendant's usual place of abode without delivering it to some person thereat. While not deciding the point, we know of no case in which such practice has been recognized in the absence of a statute permitting the affixing of the writ to the front door, or the like. The universal practice in this state has been to deliver it on the premises to some member of defendant's family who is *sui juris*. This is the express requirement of the Justice Court act and District Court act. *Comp. Stat.*, p. 1966, § 45; *Comp. Stat.*, p. 2985, § 16.

These considerations make it unnecessary to dispose of the question whether the return was made in time; but they do not lead to a quashing of the writ. The statute of limitations has run, and where a plaintiff in good faith has begun an action within time, and has failed to bring defendant into court because of mistake or default by the officer charged by law with the duty of serving the summons, the court should save the right of action if it can be done without working manifest injustice. Two methods are open—(1) to order a new summons to issue under section 53 of the Practice act of 1903, which may be done even after the limitation has expired (*Mut. Ben. Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389; reversed on another point, 27 *Id.* 604); or to direct new service of the original summons under a practice analogous to enlarging the return day. *Kloepping v. Stellmacher*, 36 N. J. L. 176; *McCracken v. Richardson*, 46 *Id.* 50; *County v. Borac Company*, 68 *Id.* 273, 275; *Walnut v. Newton*, 82 *Id.* 290, 293.

The abolition of a formal return day, an important function of which was to fix the time when declaration must be filed so as to require defendant to plead in a specified time thereafter, and the substitution of provisions that the com-

90 N. J. L.Booth & Bro. v. Glasser.

plaint shall be annexed to the summons and that defendant answer within twenty days after service on him of complaint and summons, and the new requirement that the sheriff shall serve those papers "forthwith," or within a reasonable time after their receipt, were never intended to abrogate the principle underlying the practice of extending the return day, that plaintiff should not lose his action begun in good season, by delay or error of the sheriff in getting the defendant into court. So, that while the necessity of extending the return day is eliminated, there is no reason why proper service of the original summons should not now be made, and the paper taken from the files for that purpose, or a new summons issued under section 53 of the Practice act. Either method is lawful, but the former seems to us the preferable one.

The motion to quash will be denied, but without costs, and a rule may be entered for a new summons or reservice of the old summons.

ALFRED W. BOOTH & BRO. (A CORPORATION), APPELLANT, v. JACOB GLASSER AND SAUL HARRIS. BUILDERS AND OWNERS, AND HARRIET LAZARUS. MORTGAGEE, RESPONDENTS.

Submitted December 7, 1916—Decided February 16, 1917.

In an action brought in a District Court to enforce a mechanics' lien claim, it is not necessary that a return day be named in the summons. The amendment of the act relating to the enforcement of mechanics' lien claims (*Pamph. L. 1912, p. 470*) provides the required form to be used in District as well as Circuit courts in cases brought under that act, and it was error for a District Court to dismiss such a suit for want of a return day in the summons.

On appeal from the Bayonne District Court.

Before Justices GARRISON, PARKER and BERGEN.

Booth & Bro. v. Glasser.90 N. J. L.

For the appellant, *Randolph Perkins*.

For the respondents, *Lazarus & Brenner*.

The opinion of the court was delivered by

BERGEN, J. The appellant filed a mechanics' lien claim in the office of the clerk of the county of Hudson and brought its suit to enforce it in the District Court of the city of Bayonne.

The defendant moved to dismiss the action for two reasons—*first*, "that the return day does not appear on the summons served;" *second*, "more than fifteen days has intervened between the date of the summons and the return day." The trial court granted the motion and entered a judgment dismissing the suit from which the plaintiff has appealed to this court. The question to be determined is whether section 23 of "An act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)," as amended in 1912 (*Pamph. L.*, p. 470), authorizes a summons without naming a return day in actions brought in a District Court for the enforcement of a debt for which a lien is given for labor or materials furnished in erecting a building. This statute enacts, among other things, that "when the suit is brought in a District Court the practice shall be as nearly as possible the same as now provided, or may be hereafter provided, by law, in District Courts in actions on contract." The act further provides that all suits shall be commenced by summons similar in form to that set out in the statute, which in express terms provides a form for use either in the Circuit or District Court, "as the case may be," and differs from the form required in actions on contract in the District Court, in that no return day is required, but defendant is to answer within twenty days after service of the summons with complaint annexed. The defendant argues that the amendment was not intended to change the District Court act, which provides that a summons "shall specify a certain time not less than five nor more than fifteen days from the date of such process." This contention is clearly unsound in law.

90 N. J. L.McAllister v. Atlantic City.

The only statute which confers on District Courts jurisdiction to entertain a suit to enforce a mechanics' lien, is that to be found in section 23 above mentioned, and that section, while declaring that the practice in District Courts in such cases shall be as nearly as possible the same as that provided for actions on contract in that court, further enacts that the summons shall be in form that is expressly set out in the act, and where a statute confers jurisdiction, and at the same time prescribes the form of summons to be used in enforcing claims under that jurisdiction, the entire act must be accepted as to the manner in which such jurisdiction shall be exercised. The ordinary action on contract differs from a suit to enforce a statutory lien, and the legislature in conferring jurisdiction has the right to prescribe the method in which it shall be exercised, and it has done so in this case. The summons used in this case conformed to the express terms of the statute conferring jurisdiction, and it was error to dismiss the suit for the reasons upon which such judgment was based.

The judgment appealed from will be reversed.

RICHARD McALLISTER ET AL., RELATORS, v. ATLANTIC CITY, RESPONDENT.

Argued November 9, 1916—Decided March 7, 1917.

1. A city is not required to purchase or condemn land for park purposes under *Pamph. L. 1894, p. 146*, and a writ of *mandamus* will not be allowed when it appears that the cost of purchase or condemnation will require a bond issue beyond the legal limit.
2. A writ of *mandamus* will not issue to enforce a contractual obligation. In such case a private party has a remedy by an action for damages.
3. Objection to the legal sufficiency of a plea to an alternative writ of *mandamus* should be presented by demurrer and not by motion to strike out. The Practice act of 1912 does not apply to pleadings resting on a prerogative writ.

On demurrer to plea to alternative writ of *mandamus*.

McAllister v. Atlantic City.90 N. J. L.

Before Justices GARRISON, PARKER and BERGEN.

For the relators, *Clarence L. Cole*.

For the respondent, *Harry Wootton and Gilbert Collins*.

The opinion of the court was delivered by

BERGEN, J. The relators hold an alternative writ of *mandamus* enjoining respondent to procure the title to all the land within the limit of a public park upon which a pier, known as Heinz Pier, is located, by condemnation, or otherwise, and to cause so much of the pier as is within the limits of the park to be wholly removed therefrom. The writ recites that in 1907 relators were the owners of a strip of land eighty feet wide, adjoining Rhode Island avenue, and extending southerly at that width to the exterior line established by the riparian commissioners; that April 8th, 1907, they conveyed to Atlantic City all their interest in said land, beginning in the interior line of the public park of the city and running southerly to the said exterior line; that, as authorized by statute, the respondent, by ordinance adopted October 9th, 1899, did establish the inland line of a park along the ocean front; that the aforesaid conveyance granted the interest conveyed, for and only for, use as a public park, except that the city might maintain along the interior line an elevated public boardwalk; that the grantee covenanted that the lands granted and dedicated to public use should forever be and remain open, so that the view oceanward from the elevated public walk should be free, open and unobstructed, and that no use should be made of the land inconsistent with its use as a public park; that when the deed was delivered there existed a pier known as Heinz Pier, connected with the boardwalk and extending into the ocean about five hundred feet on which are two enclosed pavilions, one within and the other without the park limits, but neither on the land granted to the city by the relators, but that about one hundred feet of the pier crosses a corner of said land; that the city is the owner of all the land within the park limits except the Heinz, and three other like piers, and

what is called the Lindley tract, and that relators have requested respondent to acquire and remove so much of the Heinz Pier as is within the limits of the park, which request has not been complied with.

The city filed a plea, setting up that the determination of the question of the necessity of procuring title to land for a park is vested in the city and not subject to *mandamus*; that the statute fixes no time for acquiring the land; that when relators conveyed, that portion of the structure they now seek to remove was on the land; that relators have, since giving the deed consented to the continuance of the platform, and have collected rent for the use of it by the pier company; that in 1885 the city authorized the construction of the pier and it was in existence when relators conveyed, subject to an agreement dedicating a strip sixty feet wide for the boardwalk; that the boardwalk was moved oceanward, owing to accretions, which required the destruction of three hundred feet of the pier, and the city agreed with the pier company that it would not interfere with so much of the pier as was within the park limits unless all other piers within the limits of the park were acquired by condemnation; that the city is not financially able to take over all the piers, as it would require a bond issue beyond legal limit, and that to condemn so much as is within relators' conveyance would not accomplish the purpose relators seek. To this plea relators demur and argue that the presence of the pier within the boundaries of the park is an obstruction in violation of the terms of the deed. This may be granted and yet the question remains whether the city can be required by *mandamus* to condemn land for park purposes, because it has acquired a part, or because of a covenant in a deed for some of the land. We do not think it can be.

In the first place, the law (*Pamph. L.* 1894, p. 146) does not require the city to acquire, it has the legal right, but is not compellable, and *mandamus* will only issue when the city refuses to perform an express legal duty, and there is in this case no such duty imposed.

Deck v. Bell.

90 N. J. L.

In the second place, the deed does not aid the relators, for the writ is never rested on a contractual obligation, in such cases the private party has his action for damages. *Mabon v. Halstead*, 39 N. J. L. 640. Again, it will never compel what cannot lawfully be done, and in this plea it appears that the city has no funds to pay any award and cannot raise it by a bond issue, as it would require a sum in excess of legal limit.

A notice to strike out the plea was given, as well as demurrer thereto, and the question was raised as to which was proper; we are of opinion that this being a proceeding resting on a prerogative writ, the Practice act of 1912 does not apply, and that the objection should be raised by demurrer and not by motion to strike out.

The demurrer will be overruled.

HOWARD S. DECK, PROSECUTOR, v. GASTON BELL ET AL.,
RESPONDENTS.

Argued February 3, 1917—Decided February 8, 1917.

Where a petition for a license to keep an inn and tavern was in the usual form, excepting a provision attached thereto reciting that the *locus in quo* is "a picnic or recreation ground of more than one acre," and there was evidence before the Court of Common Pleas from which that court might properly conclude that the *locus in quo* was of such character, the license so granted, although in the usual form for the keeping of an inn and tavern, is, in fact, a license for "a picnic or recreation ground comprising at least one acre" under the exceptions mentioned in chapter 280 of the laws of 1913 (*Pamph. L.*, p. 574), which is intended to limit the granting of licenses for inns and taverns according to a basis of five hundred of population to one inn or tavern.

On writ of *certiorari* to vacate a license to keep an inn and tavern in the township of Wayne, in the county of Passaic.

Before Justice MINTURN.

90 N. J. L.Deck v. Bell.

For the motion, *William Gourley*.

Contra, G. Rowland Munroe.

MINTURN, J. A writ of *certiorari* was granted to review the proceedings of the Passaic Common Pleas, granting a license to keep an inn and tavern to Gaston Bell, in the township of Wayne, in the county of Passaic. The petition for the license was in the usual form, except a provision attached thereto reciting that the *locus in quo* is "a picnic or recreation ground of more than one acre."

This *addendum* was intended to bring the applicant within the provisions of chapter 280 of the laws of 1913 (*Pamph. L.*, p. 574), which is intended to limit the granting of licenses for inns and taverns according to a basis of five hundred of population to one inn or tavern, excepting in certain specified instances among which is "a picnic or recreation ground comprising at least one acre."

No question is made as to the character of the applicant, or of the place, the sole contention of the remonstrance being that the township at present is sufficiently supplied with inns and taverns, and that while the application is in effect for a license to keep a picnic or recreation place, under the exception contained in the act of 1913, the license granted by the Common Pleas was specifically for the keeping of an inn or tavern, and was therefore invalid.

The act is obviously a prohibitory act within defined limitations. Its plain intent was to restrict the granting of licenses to a basis of population in all municipalities, except in certain specified instances, among which is the picnic or recreation ground of at least one acre.

It will be observed that the act provides generically for the granting of a license for an inn and tavern, and for nothing else. "No license to keep an inn or tavern" is the mandatory language, limiting the granting of licenses to a status based upon population. "But," the act continues, "this prohibition shall not apply to any premises," and then

follows a statement of the exempted classes, *inter alia*, the one in question.

It may well be, as counsel for the remonstrants contends, that the license should be issued to one of the excepted classes, *eo nomine*. Such a procedure would certainly be consistent with the actual status presented, for instance, in the excepted class of a club or an association, which have never been accorded the designation of an inn or tavern. But the act seems to retain the common law generic designation for all licenses issued under its provisions, and therefore the validity of the license cannot be successfully challenged upon that ground.

It need only be added that support for this construction of the act is contained in the views expressed by Mr. Justice Kalisch, for this court, in *Fort v. Common Pleas*, 89 N. J. L. 144.

This act received its initial construction in this court, in *Tilton v. Common Pleas of Ocean*, 87 N. J. L. 47; 92 Atl. Rep. 87, and it was there held that the advertising requirement of the act, based upon the population provision, was discretionary with the Court of Common Pleas, and that an order made thereunder was not reviewable here.

This construction is consistent with the views entertained by this court in the earlier cases, under the prior inn and tavern legislation. Thus in *Barnegat Beach Association v. Busby*, 44 N. J. L. 627, it was held that where the Common Pleas has jurisdiction to grant licenses, under the act concerning inns and taverns, this court will not on *certiorari* review such discretion, in granting or refusing licenses, or look into the facts upon which the discretion is exercised. To the same effect is *Smith v. Corbett*, 59 Id. 584, and *Houman v. Schulster*, 60 Id. 132.

In the case *sub judice*, there was evidence from which the Common Pleas might properly conclude that the *locus in quo* contained a picnic or recreation ground of an acre in extent, so as to bring it within the contemplation of the legislative exception. Upon this hearing it must be assumed,

90 N. J. L.

Irwin v. Atlantic City.

under the adjudications referred to, that the trial court so found.

It is urged that the act of 1899, chapter 77, is in *pari materia* with the act of 1913, and must be considered in defining the term "park" and "recreation grounds," as used in the latter act. The act of 1899 consists of a distinct title in nowise related to the subject of inns and taverns, with which the legislation *sub judice* is intended to deal. It applies entirely to corporations "managing parks, picnic and pleasure grounds," and apparently segregates such localities for licensing purposes when managed by a corporation from the common law category of an inn and tavern, as defined by law and utilized in practice by the individual, under the modern requirements and modifications of the ordinary existing excise legislation as derived from the common law, and the earlier statutory regulations of the subject. *Leeds v. Altreuter*, 84 N. J. L. 722.

These conclusions lead to a dismissal of the writ, but without costs.

WILLIAM H. IRWIN, PROSECUTOR, v. CITY OF ATLANTIC CITY, RESPONDENT.

Submitted December 7, 1916—Decided March 22, 1917.

1. The act of 1916 (*Pamph. L.*, p. 283), requiring the owner of jitney busses to comply with certain legislative regulations, and to pay a specified tax into the treasury of the city in which they are operated, imposes a state-wide policy of regulation upon all subordinate governing bodies, in the use and regulation of such a method of transportation, but it contains nothing in its provisions to indicate that it was the legislative purpose to repeal the powers of regulation theretofore conceded to municipalities by their respective charters.
2. In the absence of an express intent to repeal, or of a legislative intent to deal *de novo* with the entire subject, evinced by the existence of incongruous enactments, demonstrating *ex necessitate* the legislative purpose to supersede existing legislation by the later law, a repeal by implication is not favored.

Irwin v. Atlantic City.90 N. J. L.

On *certiorari* removing for review an ordinance of Atlantic City.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Theodore W. Schimpf*.

For the respondent, *Harry Wootton*.

The opinion of the court was delivered by

MINTURN, J. The facts agreed upon are as follows:

1. That Atlantic City is a municipal corporation.
2. That Atlantic City is governed under the provisions of an act entitled "An act for the government of cities." *Pamph. L. 1902, p. 284.*

3. That the city of Atlantic City is now governed by what is commonly known as the Commission Government act of 1911, and the several supplements and amendments thereto.

4. That the distance covered in the ordinance passed May 24th, 1916, approved September 2d, 1916, is as follows: "From Maine to Albany avenue, two and six-tenths miles; from Albany to Jackson avenue, seven-tenths of a mile; from Caspian avenue to the Boardwalk, nine-tenths of a mile; that the distance covered by the trolley company of Atlantic City from the Inlet to Jackson avenue is three and seven-tenths miles; from Jackson avenue to Savannah avenue, one and nine-tenths miles; that the single fare charged by the railroad company from the Inlet to Savannah avenue is five cents."

5. That Atlantic City is laid out with reference to its streets in the manner following: Abutting the ocean is a boardwalk, and running parallel with said boardwalk are the following main streets: Pacific avenue, Atlantic avenue, Arctic avenue, Baltic avenue and Mediterranean avenue. That Atlantic avenue is the main business street of Atlantic City, and on the said street are two sets of tracks which are used by the Atlantic City and Shore Railroad Company, in the operation of trolley cars on Atlantic avenue, for the

90 N. J. L.

Irwin v. Atlantic City.

carrying of passengers; that Atlantic avenue is intersected by many cross streets from the Inlet to Jackson avenue; that said Atlantic avenue is intersected, among other streets, by Virginia avenue, South Carolina avenue and Florida avenue, on which streets are laid tracks on which trolley cars are operated, for the carrying of passengers, and is also intersected by Georgia avenue and Mississippi avenue, on which there are tracks which are used, chiefly in summer time, for the incoming and outgoing excursion trains, propelled by steam.

6. That the prosecutor is a resident of the city, and at the time of the granting of the writ was the owner and operator of a jitney bus, for hire, over the streets of the city.

The charter of the city (*Pamph. L.* 1902, p. 284) empowered the council to regulate the use of the city streets.

The act of 1916, page 283, requires the owner of an auto or jitney bus to comply with certain legislative regulations, and to pay a specified tax to the city treasury. This act has been held to be constitutional by this court. *West v. Asbury Park*, 89 N. J. L. 402.

On August 24th, 1916, the city adopted an ordinance providing additional regulations for the use and operation of such conveyances, and provided penalties for the violation of these regulations. The validity of this ordinance is the question controverted here; the insistence in effect being that the legislature by the act of 1916, having dealt with the subject-matter, and regulated it, from the viewpoint of state policy, it is *ultra vires* for the municipality to add other and further regulations in the interest and well-being of local government. The power of the city to regulate the use of its streets and generally to legislate, under its charter provisions, for the purposes in question here, anterior to the passage of the act of 1916, has been definitely settled by the adjudications. *Fonsler v. Atlantic City*, 70 N. J. L. 125; *Ferretti v. Atlantic City*, *Id.* 489; *Brown v. Atlantic City*, 71 *Id.* 81; *Reed v. Saslaff*, 78 *Id.* 158; *Brown v. Atlantic City*, 72 *Id.* 207; *Harris v. Atlantic City*, 73 *Id.* 251; *Morwitz v. Atlantic City*, *Id.* 254.

Irwin v. Atlantic City.90 N. J. L.

These cases and others not necessary to cite, determined not only the legal right of the city to so legislate, but also emphasized the reasonableness of the provisions of the ordinances passed in pursuance of this general power.

The act of 1916, page 283, imposed a state-wide policy of regulation upon all subordinate governing bodies, in the use and regulation of this method of transportation, but it contains nothing in its provisions to indicate that it was the legislative purpose to repeal the powers of regulation theretofore conceded to municipalities by their respective charters. The requirements contained in the act of 1916 were manifestly superadded to the exercise of such powers, as the municipalities may legally exercise, for the best interests of reasonable local self government, in the management, control and regulation of municipal highways, and the safety and protection of the inhabitants thereon.

In the absence of an express intent to repeal, or of a legislative intent to deal *de novo* with the entire subject, evinced by the existence of incongruous enactments, demonstrating *ex necessitate* the legislative purpose to supersede existing legislation by the later law, a repeal by implication will not be favored. *State, Morris Railroad Co., v. Commissioners*, 37 N. J. L. 228; *State v. Blake*, 35 *Id.* 208; *S. C.*, 36 *Id.* 442.

It was competent for the commissioners to impose reasonable conditions upon the exercise of the right conferred, if deemed expedient in the public interest.

Our consideration of the remaining reasons, presented by the prosecutor, leads us to conclude that they are without substance. The ordinance will be affirmed.

90 N. J. L.McGurty v. Newark.

MARY MCGURTY, PROSECUTOR, v. MAYOR AND COUNCIL
OF THE CITY OF NEWARK ET AL., RESPONDENTS.

Argued November 8, 1916—Decided March 28, 1917.

1. Where the justice and legality of the claim of the widow of a policeman, against a board of police commissioners, for a pension, have been established subsequent to an adverse ruling on her claim, but which ruling was made without giving her an opportunity to be heard, and the result of which she was in ignorance except for having learned of it some time thereafter in the newspapers, and it appearing that, after learning of such adverse action, she had made endeavors to have the matter reheard, the defendant cannot invoke the equitable doctrine of estoppel or laches, based upon its manifest improper deprivation of the right of the prosecutrix to an existing legal claim, which, but for the initial error in procedure, would have been terminated in her favor.
2. Laches under any circumstances is a relative term and is invoked upon equitable considerations to prevent injustice by unsettling rights which have accrued during an interval of apparent repose, due to a claimant's inexcusable inaction.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Chandler W. Riker*.

For the defendants, *Harry Kalisch*.

The opinion of the court was delivered by

MINTURN, J. The writ of *certiorari* removes a resolution of the Newark board of police commissioners, refusing to pay to the prosecutrix the amount claimed to be due to her as a pension consequent upon the death of her husband, a former policeman of the city of Newark. An application is also made upon a rule to show cause for a peremptory *mandamus* upon the board of trustees of the Newark police pension fund, in the event of the determination of the *certiorari* case in her favor, requiring the payment to the prosecutrix or relator of the amount due to her in accordance with a subsequent resolution of the police commissioners. The

McGurty v. Newark.

90 N. J. L.

facts are undisputed, and are presented in a stipulation of counsel forming part of the record.

The deceased police officer, John McGurty, had served for seventeen years upon the police force, and at the time of his death was in good standing upon the force and as a member of the police pension fund.

Shortly after his death, the prosecutrix applied to the police commissioners of the city of Newark for a pension, and that body, without notice of any hearing to her, reported adversely to her claim, having first referred the matter to the police surgeon, who, without hearing the prosecutrix, reported adversely upon her claim.

The knowledge which the prosecutrix obtained of this action of the board, and its medical officer, was derived from a chance reading of the trustees' action in a Newark newspaper, and for nearly one year she remained without official notice of the disposition of her claim. The formal disallowance of the claim was not made until July 26th, 1916. In the meantime, she and her counsel were actively engaged in negotiating with the board of trustees of the police pension fund for the payment of the claim.

On December 28th, 1914, an application was made through the mediation of a charitably disposed citizen, in her behalf, to the board of police commissioners to re-open her application, and on April 26th, 1915, the application was granted and she thereafter presented her case, supported by the testimony of various witnesses, medical and otherwise, with the result that on December 15th, 1915, she was granted by resolution a pension of \$650 per year. The trustees of the police pension fund refused to honor the resolution, upon the ground, *inter alia*, that the prior resolution of the board of police commissioners was a final disposition of the claim. That alleged legal barrier she seeks herewith to remove, by this writ of *certiorari*, as a precedent condition to her claim for a writ of *mandamus*.

The main contention, however, is doubtless presented in the brief of counsel for the defendant, and is based upon the fact that during the interim between the first action of the

board of police commissioners in 1912, rejecting the claim, and their final action allowing it, the personnel of the subscribers to or members of the police pension fund had been increased by the addition of one hundred and forty-eight members of the police force, whose fiscal rights as participants in the pension fund it is alleged would be inequitably and unreasonably damnified at this juncture by the allowance of this claim.

This contention would have a semblance of authority to support it as a claim of laches, upon the mere statement of the main facts, if severed from and unrelated to what the record presents, as the exact status of the prosecutrix. The record shows that the prosecutrix *in ops consilii*, vested with a property right in the fund in question, was deprived of that right without an opportunity to be heard or to present her case, and remained in ignorance of the situation until by chance she was informed of it through the public prints. That her right to participate in the fund was thus adjudicated against here without any notice to her of the fact. That the interim between the casual unofficial notice she received from a newspaper, and the granting of the writ of *certiorari*, was occupied in great part by her and her friends in an effort to have her case reopened, and an opportunity offered to her to present her case as she might have done in the first instance. That, as a result of this opportunity, an adjudication was had and her claim was allowed. The justice of her claim was thereby vindicated, and what should have been accorded to her in the first instance in the way of regular municipal procedure, was by this belated action for the first time manifested by official resolution.

The justice and legality of the claim having been thus conceded, the defendant is not now in a position to invoke the equitable doctrine of estoppel or laches, based upon its manifest improper deprivation of the right of the prosecutrix to an existing legal claim, which, but for the initial error in procedure, would, we must assume, in the light of the present status, have terminated in her favor. Laches under any circumstances, like negligence, is a relative term,

Ninth Street Imp. Co. v. Ocean City.

90 N. J. L.

and is invoked upon equitable considerations to prevent injustice, by unsettling rights which have accrued during an interval of apparent repose, due to a claimant's inexcusable inaction. 2 *Bouv.* 1820. Specifically, its definition is synonymous with "inexcusable delay." 25 *Cyc.* 840, and cases.

Instances are presented in our reports where, *ipso facto*, lapse of time has been held not to bar the issuance of the writ in a cause otherwise meritorious. *State, Evans, v. Jersey City*, 35 N. J. L. 381; *State, Barter v. Jersey City*, 36 *Id.* 188.

We are unable to characterize the delay in this instance as inexcusable in the light of the circumstances as we perceive them.

The result is that the original resolution or proceeding of the board of police commissioners, refusing the pension in question, must be set aside; and since no dispute exists as to the facts in the case involving a disputed legal status, no reason seems to exist why a peremptory writ of *mandamus* should not issue to the board of trustees of the Newark police pension fund, requiring them to pay to the relator the amount of the pension and arrears of pension to which the relator is entitled under the resolution of the board of police commissioners adopted on December 22d, 1915.

NINTH STREET IMPROVEMENT COMPANY, PROSECUTOR,
v. CITY OF OCEAN CITY, RESPONDENT.

Argued November 10, 1916—Decided March 21, 1917.

1. By the provisions of section 8 of *Pamph. L.* 1911, p. 471, commonly known as the "Walsh act." the adoption by any city of the provisions of that act results in the confirming and validating of such local legislation as the city governing body had passed and which is then in operation in the municipality.

90 N. J. L.Ninth Street Imp. Co. v. Ocean City.

2. A prosecutor of a writ of *certiorari* is too late to be heard to complain of alleged informalities and irregularities in the procedure of the adoption of a building code ordinance twelve years after its adoption, and under which ordinance citizens of the municipality, affected thereby, have expended their means and conformed their building operations to comply with its provisions.
-

On *certiorari* removing ordinances of Ocean City.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Clarence L. Cole* and *Babcock & Champion*.

For the respondent, *Andrew C. Boswell* and *W. Holt Apgar*.

The opinion of the court was delivered by

MINTURN, J. The case presents the following state of facts, as contained in the stipulation of counsel.

Ocean City is a city having less than twelve thousand population, and is operating under an act approved March 24th, 1897, entitled "An act relating to and providing for the government of cities in this state containing a population of less than twelve thousand inhabitants." *Pamph. L.* 1897, p. 46. The city has also adopted the Walsh act.

The Ninth Street Improvement Company was incorporated May 31st, 1916, the certificate being recorded in the clerk's office of Cape May county on June 8th, 1916.

The building code, in addition to what is shown by the return, contains the following: "Passed at an adjourned regular meeting of the common council this seventh day of March, A. D. 1904, George O. Adams, President of Council, certified to this seventh day of March, A. D. 1904, T. Lee Adams, City Clerk, approved this eighth day of March, 1904, Joseph G. Champion, Mayor," and the amendment to the code contains the following: "Adopted this sixth day of April, A. D. 1908, Harry G. Stanton, President of Council, certified to this sixth day of April, 1908, T. Lee Adams,

City Clerk, approved this seventh day of April, 1908, I. M. Cresse, Mayor."

The reasons filed by the prosecutor are intended to attack the validity of the ordinances in question, as well as their reasonableness. The building code was passed on March 7th, 1904, in pursuance of the provisions of the charter of the city. The Walsh act was passed in 1911. *Pamph. L. 1911, p. 462*. Its adoption by the city of Ocean City resulted in confirming and validating such local legislation as the city governing body had passed, and which was then operative in the municipality. Whatever formal defects may have existed in the procedure necessary to pass such ordinance were cured by the adoption, *ipso facto*, of the new legislation. *Pamph. L. 1911, p. 471, § 8*.

But, aside from that consideration, it cannot be overlooked that the attack upon the ordinance in question was not undertaken until over twelve years had elapsed since the date of its adoption. During that interval it is reasonable to assume that the citizens of the municipality affected by the provisions of this ordinance, regulating, as it specifically expresses, "the manner of building dwelling-houses and other buildings," have expended their means and conformed their building operations to comply with its provisions, and have fixed their status as property owners accordingly.

In such a situation, this prosecutor is too late to be heard to complain of alleged informalities and irregularities in the procedure which led to its adoption. *State, Noe, v. West Hoboken, 37 Atl. Rep. 439; State, Zabriskie, v. Hudson City, 29 N. J. L. 115; Budd v. Camden, 69 Id. 193; Howell v. Flemington, Id. 597*.

We think these considerations dispositive of the objections urged against the ordinance. The attack upon the garage ordinance is based upon the contention that it is *ultra vires*.

The provisions of the Walsh act, it is assumed, presented the basic law for the adoption of this ordinance. Section 8 of that act provides that the city adopting the act shall have power to enact and enforce "all ordinances necessary for the protection of life, health and property;" to declare, pre-

90 N. J. L.

Crane v. Jersey City.

vent and abate nuisances, and to preserve and enforce "the good government, general welfare, order and security of the city," by the passage of ordinances consonant with "the laws applicable to all cities of this state," and the "provisions of the constitution."

These provisions manifestly convey in unmistakable terms a liberal concession of governmental authority in aid of the reasonable and constitutional exercise of the police power by the municipalities adopting the provisions of the act.

The definition and limitation of that power under our constitutions, state and federal, have presented such a prolific subject for judicial investigation and discussion, that no more need be said upon the topic here than that in our judgment the erection and management of a garage, with all its incidental dangers and inconveniences to adjoining property and public travel, are manifestly matters properly cognizable by the municipal governing body as a subject for regulation in the public interest, under the police power expressly conferred, as in this instance, or reasonably implied *ex necessitate* in aid of the general welfare against dangers recognized and obvious, to persons and property. *Slaughter House Cases*, 16 Wall. 36; *Cooley's Const. Lim.* 227.

We think that the ordinances under review should be affirmed, with costs.

PATRICK CRANE, PROSECUTOR, v. THE MAYOR AND ALDERMEN OF JERSEY CITY ET AL., RESPONDENTS.

Submitted July 6, 1916—Decided February 8, 1917.

1. The fact that a superior officer, in whom the law has vested the authority to try his subordinates upon charges preferred against them, has, on previous occasions, reprimanded or disciplined them for delinquencies in the performance of their duties, does not, *per se*, in the absence of a statutory mandate forbidding it, disqualify such superior officer from trying them on charges duly preferred against them.

Crane v. Jersey City.

90 N. J. L.

2. A director of public safety, in a city governed under the provisions of the "Walsh act," has the power, sitting alone, to try a member of the police department on charges preferred against him, where the board of commissioners have, by resolution, and in accordance with the provisions of *Pamph. L. 1915, p. 494*, amending section 4 of *Pamph. L. 1913, p. 836*, conferred upon such director the judicial powers exercised by him.
3. The admission of illegal testimony, in cases tried by a special tribunal, such as a city commission, will not have the effect to invalidate the findings of that tribunal so long as it appears that there is competent testimony in the case to support such findings.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Harry Lane*.

For the respondents, *John Milton*.

The opinion of the court was delivered by

KALISCH, J. On the 21st day of October, 1915, the prosecutor, who was a member of the Jersey City police department, was dismissed from that body. The ground of his dismissal was conduct unbecoming an officer. The specific charges made against him were that on the 13th day of October, 1915, while on duty at the Jewett avenue stable, he was ordered by Lieutenant Lynch, his superior officer, to leave the stable door open, whereupon the prosecutor used vile language, assaulted and attempted to shoot Lynch; that on the 14th day of October, 1915, the prosecutor, when ordered by Lieutenant Lynch to make out a report regarding his, the prosecutor's conduct the day previous, used vile and threatening language to the lieutenant and refused to make out the report, and that such conduct was in violation of rule 25, section 34 of the manual of the Jersey City police force. The prosecutor, on the 21st day of October, 1915, was put upon trial before Frank Hague, director of department of public safety. The accused appeared with counsel and objected to being tried by the director on two grounds—

first, that the director was disqualified to try the cause because in a letter written by that official to the chief of police of Jersey City, he had expressed an unfavorable opinion on the conduct of the prosecutor as a police officer; *secondly*, that the director was without jurisdiction to try the prosecutor, sitting alone, in that the prosecutor was entitled to a trial by the entire board of city commissioners.

These objections were overruled by the director and the trial proceeded. Witnesses were sworn and examined and cross-examined, the accused officer being a witness in his own behalf.

The letter which is made the basis of the prosecutor's claim that the director was disqualified to try the prosecutor upon the charges preferred against him, was embodied in an order made by the director on the 21st day of February, 1915, and which order is designated as "General Order No. 21." A part of the letter which the prosecutor claims disqualified the director to sit in judgment, reads as follows: "This man is constantly reporting sick, and I am convinced that his ailments are only imaginary, with the purpose of shirking his duties. I have stated before in a communication to you that I am determined to drive such men as these out of the department and I only regret that I have not sufficient evidence to place Crane (the prosecutor) before the commissioners on charges, and recommend his dismissal."

Reading the entire letter, it becomes plain that the director was attempting to eradicate an evil that had grown up in the police department, namely, for some officers to feign illness, be relieved from duty on account of illness, and draw full pay. In order to stop this nefarious practice, the director used plain and emphatic language. But it is an idle thought to entertain for a single moment that the director was actuated by personal malice against the men in his department generally or against the prosecutor in particular. The director was manifestly actuated by a proper spirit of public service, and it was his duty to protect the public against imposition and to enforce proper and strict discipline in the department of which he was the head, and

for the proper conduct of which he was answerable to the public.

It is further to be observed that what was said, by the director; in this letter, written some six months prior to the happening of the event, which gave rise to the present charges, has no connection whatever with the nature of the charges upon which the prosecutor was tried.

The fact that a superior officer, in whom the law has vested the authority to try his subordinates upon charges preferred against them, has on previous occasions reprimanded or disciplined them for delinquencies in the performance of their duties, does not, *per se*, in the absence of a statutory mandate forbidding it, disqualify such superior officer from trying them on charges duly preferred against them.

As we are unable to discover any evidence of bias or oppressive conduct on the part of the director in the trial of the prosecutor, we are forced to the conclusion that he was not disqualified to inquire into and determine the truth of the charges made against the prosecutor.

As to the point made by counsel for the prosecutor, that the director sitting alone was without jurisdiction to try the accused, in that the statute contemplates a trial by the entire board of city commissioners, we find to be without merit.

Prior to the adoption of the act of 1915 (*Pamph. L.*, p. 494), amending section 4 of the act of 1913 (*Pamph. L.*, p. 836), the law required the entire board to sit in a case like the present. *Herbert v. Atlantic City*, 87 N. J. L. 98. In that case the prosecutor was a member of the police department of Atlantic City and was tried by the entire board of commissioners, sitting as a special tribunal for that purpose. The authority of the board to try the case was objected to by the prosecutor upon the ground that by an ordinance previously adopted by the board, the power attempted to be exercised had been transferred by the board to a single commissioner—the director of the department of public safety.

This court held that, since the legislature vested the judicial powers in the board of commissioners, the latter could not lawfully divest itself of such powers and transfer them to the director of public safety.

Evidently, in view of the ruling of this court in that case, the legislature amended section 4 of the act of 1913, so as to authorize the board of commissioners to distribute the executive, administrative, judicial and legislative powers, authority and duties into and among five departments in cities having five departments, &c. This was decided in *Brennan v. Jersey City*, at the June term, 1916, by this court in an unreported opinion.

In the present case it appears that the board of commissioners by resolutions had conferred upon the director of the department of public safety the judicial powers exercised by him.

It is next urged that the prosecutor was dismissed without sufficient evidence to justify his dismissal, and that the conviction was against the clear weight of the evidence.

An examination of the evidence leads us to the conclusion that the judgment, pronounced by the commissioner against the prosecutor, is fully supported by the preponderance of the credible testimony in the case.

Lastly, it is insisted that the proceeding must be set aside because illegal testimony was admitted over objections of counsel for prosecutor. The admission of illegal testimony, in cases tried by a special tribunal like the one whose proceedings we are considering, will not have the effect to invalidate the finding of the tribunal, so long as it appears that there is competent testimony in the case to support such finding. In the present case, the competent testimony amply supports the judgment of the commissioner.

The writ will be dismissed, and the proceedings affirmed, with costs.

S. I. W. and C. Co. v. Common Pleas of Hudson. 90 N. J. L.

SAFETY INSULATED WIRE AND CABLE COMPANY, PROSECUTOR, v. COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF HUDSON ET AL., DEFENDANTS.

Submitted December 7, 1916—Decided April 7, 1917.

1. Where, in a suit brought under the Workmen's Compensation act, an award is made, based on a finding of total disability, and it appears that a year and a half after the award the petitioner's earning capacity had been fully restored, it was erroneous for the Court of Common Pleas to refuse an order modifying the original award, as provided by section 21 of the act. *Pamph. L. 1911, p. 143.*
2. The basic principle of the Workmen's Compensation act is indemnity. Therefore, when it appears, in a case where an award has been made, that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court, upon proper application, to interfere and grant relief.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Isidor Kalisch*.

For the defendants, *Alexander Simpson*.

The opinion of the court was delivered by

KALISCH, J. This matter comes before us, by writ of *certiorari*, to review the legality of an order made by Judge Tennant, Judge of the Hudson County Court of Common Pleas, dismissing a petition for rehearing, filed by the prosecutor in a workmen's compensation case, and directing that an order awarding compensation theretofore entered in favor of Philip Kress, be continued with full force and effect, with costs.

On or about April 1st, 1912, Philip Kress, who was in the employ of the prosecutor received an injury in his employment. Within the year Kress filed a petition

90 N. J. L. S. I. W. and C. Co. v. Common Pleas of Hudson.

in the Hudson County Common Pleas Court for compensation under the Workmen's Compensation act, and Judge Carey, who was then the judge of that court, after a hearing, in a determination of facts and order filed March 8th, 1913, ordered that the prosecutor should pay as compensation to Kress for his injuries \$6.21 per week for a period of four hundred weeks. In February, 1916, an application based upon a petition was made by the prosecutor to Judge Tennant, the successor of Judge Carey, for a hearing, and the judge made an order with the consent of the attorney representing Philip Kress, that the hearing on the application be set down for Friday, the 10th day of March, 1916. On May 12th, 1916, the case came on before Judge Tennant for a hearing upon a stipulation between counsel for the respective parties, to determine whether the order awarding compensation theretofore entered in the cause should be modified.

The hearing developed that Kress was earning \$12.42 at the time he was injured. The injuries he sustained were as follows: The loss of the third and fourth fingers of the left hand and impairment of the use of the remaining fingers on the left hand; loss of two joints of forefinger of right hand, and permanent loss of use to first joint of thumb on the right hand.

The injuries enumerated were those which appeared to have been sustained by Kress when he testified at the original hearing before Judge Carey, in addition to the fact that the petitioner at that time also complained that he suffered from pains in the head, and it further appeared that he was unable to perform any work. Judge Carey allowed four hundred weeks' compensation and, therefore, the basis of this allowance under the Compensation act must have been that there was permanent and total disability.

The statute provides that the loss of both hands, or both arms, or both feet, or both legs, or of any two thereof, shall constitute total and permanent disability, to be compensated according to clause *b* of the act of 1911, section 11, page 137; and in reverting to the clause referred to, we find that

S. I. W. and C. Co. v. Common Pleas of Hudson. 90 N. J. L.

compensation in such cases shall be paid for a period not beyond four hundred weeks.

We think the statute contemplated other disabilities total in character and permanent in quality besides those enumerated. This we gather from the final clause to section *b*, which reads: "This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks."

Furthermore, it is to be noted in this connection that section *c* proceeds to give a schedule of injuries, their basis of compensation and number of weeks of duration. We find that all the injuries testified to by the petitioner existed at the original hearing and are to be found in schedule *c*. Basing the period of duration of compensation to which the petitioner was entitled, by reason of the character of his injuries, on the schedule of section *c*, it needs no argument to demonstrate that he was not entitled to a period of four hundred weeks. The award of four hundred weeks made by the court on the original hearing can only be reasonably accounted for on the theory that the court grouped the various injuries which the petitioner sustained, plus the pains in the head of which the petitioner complained, and found that they constituted disability total in character and permanent in quality.

It will be presumed in the absence of anything to the contrary, that the finding of the court was justified by the facts then adduced. On the hearing of the present application, it appeared that the petitioner was incapacitated from performing any labor for a year and a half, but that afterwards he succeeded in obtaining employment of a light character for which he was paid \$9 per week. Subsequently he was employed as a watchman in a factory, which position he still holds, at \$12 per week, which wages were later raised to \$14 per week. It thus appeared before the court below that the petitioner's earning capacity had not only been restored, but that he was receiving \$2 a week more for his labor than at the time he was injured.

90 N. J. L. S. I. W. and C. Co. v. Common Pleas of Hudson.

Upon this state of the facts, counsel for the prosecutor bases the argument that since the award made in the original proceeding the petitioner's condition has improved to such an extent that it is no longer a total disability, and that, therefore, the prosecutor is entitled to have the original order awarding compensation modified.

Because it appeared that the injuries of the petitioner were the same as when he applied for compensation, the court below proceeded upon the theory that the present application involved a review of the propriety of the award in the original proceeding, and, therefore, refused to modify the award. But it is obvious that this was an erroneous conception of the situation.

Although the original award is incidentally involved in the application for a modification thereof, it is clear that the application was in nowise an attack on the propriety of the award upon the facts as they then appeared before the court. The essential new fact, which was disclosed to the court below, was that what appeared in the condition of the petitioner in the original proceeding to be a total disability has proved in the course of time not to be so, as evidenced by the fact of the ability of the petitioner to perform labor at higher wages than at the time of his injuries.

By section 21 of the Workmen's Compensation act of 1911, page 143, it is, among other things, provided that an award of compensation may be modified at any time after one year from the time when it became operative, and may be reviewed upon the application of either party on the ground that the incapacity of the injured employe has subsequently increased or diminished.

It is to be observed that the term "incapacity of the injured employe" is used. The legislature has thereby established the test of "incapacity" as the determining factor whether an award shall be diminished or increased, as the case may be. The incapacity which the legislature had in mind was the incapacity to perform labor. This, of course, is not applicable to the class of cases which the legislature has expressly declared to be that of total disability, such as

Seglie v. Ackerman.

90 N. J. L.

the loss of both legs, &c., and for which there is a fixed period of compensation.

It must be borne in mind that the basic principle of the Compensation act is indemnity. Therefore, when it appears, in a case where an award has been made, that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court upon a proper application to interfere and grant relief.

These views lead to the setting aside of the order made by the court below dismissing the application of the prosecutor and directing that the order awarding compensation in the original proceeding be continued in full force and effect.

The record will be remanded that the case may be proceeded with in accordance with the views expressed herein.

PAUL SEGLIE, PROSECUTOR, v. HENRY ACKERMAN ET AL.,
DEFENDANTS.

Argued March 10, 1917—Decided April 2, 1917.

1. A petition for a recount, stating that the petitioner has reason to believe that an error has been made by various boards of election sufficient to change the result of the election and that the written return in one district varied from the report in figures, is sufficient to properly invoke the jurisdiction of the Supreme Court to make an order for a recount under section 159 of the Election law.
2. The granting of an application for a recount under section 159 of the Election law is not dependent upon the final result as declared by the board of county canvassers, and may be made before such result is officially determined.
3. It is not necessary to the validity of a recount that the justice of the Supreme Court, making the order, be actually present and presiding at the recount. The statutory mandate that the recount shall be under the direction of the justice simply puts a recount under his judicial control or direction, which direction may be properly exercised by the justice out of the presence of the board by an order, in writing, or verbally in the presence of the board.

90 N. J. L.

Seglie v. Ackerman.

4. The power conferred by statute upon a justice of the Supreme Court to grant a recount to be had under his direction is not limited in its exercise by him in his individual capacity as such justice, but upon the judicial office, irrespective of the individual invested therewith.

On *certiorari*.

At a general election held in Hudson county on November 7th, 1916, the prosecutor and Henry Ackerman, the defendant, were opposing candidates for the office of boulevard commissioner.

The county board of elections, having canvassed the vote, declared on December 4th, 1916, that the prosecutor had a majority of twenty-two votes over the defendant Ackerman, and issued to the prosecutor a certificate of election as boulevard commissioner.

It appears that within ten days after election, to wit, on the 17th day of November, the defendant Ackerman presented a verified petition to Mr. Justice Swayze, the presiding justice of the Hudson County Circuit, for a recount of the votes cast for boulevard commissioner, in whole or in part, as such justice might determine. The basis of the petitioner's application is set out as follows: "Your petitioner further shows that he has reason to believe that an error has been made by various district boards of election of said county in counting and declaring the vote of said election, whereby the result of such election has been changed; and further shows that in the return of the elections filed by the board of registry and election of the first district of the second ward of the city of Bayonne, according to the written return of the votes cast for one Paul Seglie, he received one hundred and twenty-seven votes, while according to the statement of said vote expressed in figures he received one hundred and forty-seven votes."

Upon this petition the Supreme Court justice, on December 1st, 1916, made an order for a recount. The counting of the ballots occupied a long time and extended beyond the 19th day of January, 1917. The term of Mr. Justice Swayze expired on January 19th, 1917. He was reappointed on

Seglie v. Ackerman.90 N. J. L.

January 22d, 1917. Several sessions of the board of elections were held after January 19th, 1917, at which a considerable number of ballots were counted by the board. The justice, subsequent to his appointment, also passed upon disputed ballots held by the board for his decision. On the recount, Ackerman, the defendant, appeared to have a majority of one hundred and four votes over the vote received by the prosecutor. This result was certified by the board of elections to Mr. Justice Swayze, whereupon the justice, on February 13th, 1917, made an order revoking the prosecutor's certificate of election and issued in place thereof a certificate of election to the defendant Ackerman. The prosecutor, on this *certiorari*, challenges the jurisdiction of the Supreme Court justice to revoke his certificate of election.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Aaron A. Melniker, J. Emil Walscheid and George McEwan.*

For the defendant, *Gilbert Collins and Richard Doherty.*

The opinion of the court was delivered by
KALISCH, J. The first ground advanced by the prosecutor and upon which he bases the assertion that the justice of the Supreme Court lacked jurisdiction to entertain the application for a recount, is that the petition upon which the order for a recount was made did not comply with section 159 of the Election law, in that it failed to set out sufficient reasons for a recount within the meaning of that section. The alleged particular defect in the petition pointed out by the prosecutor is that the petition contains no facts upon which the petitioner based his belief. A similar objection was taken on a petition for a recount in *Kearns v. Edwards*, 28 *Atl. Rep.* 723. In that case the petition set out that the petitioner had good reason to believe, and did believe, that errors had been made in several boards of election within the district in counting the votes, whereby the

90 N. J. L.

Seglie v. Ackerman.

result of the election had been changed, &c. The defendant objected that the petition stated no facts upon which the petitioner based his belief, and showed no grounds for believing any error had been made. Mr. Justice Depue held the petition to be sufficient. The like objection was made against the petitioner for a recount under section 159 of the Election law in *Carson v. Scully et al.*, 89 N. J. L. 458, and the court, following the ruling in *Kearns v. Edwards*, held the petition to be sufficient. The court in *Carson v. Scully et al.*, *supra* (at p. 467), makes the observation that the legislature made no provision in section 159 as to the manner in which an application for a recount shall be presented. The invariable practice has been to make the application for a recount, in writing, in the form of a petition addressed and presented to a justice of the Supreme Court, which we deem good practice and should be adhered to. We are also of the view that in the present case the facts set out in the petition were sufficient to properly invoke the jurisdiction of the Supreme Court justice to make the order for a recount under section 159.

Next, the prosecutor attacks the validity of the order for the recount upon the ground that the order was made before any result of the election had been officially declared.

The statute permits an application for a recount to be made at any time within ten days after the election. Such application may be made the very next day. For it is to be observed that section 159 permits an application for a recount by any candidate at any election who has reason to believe that an error has been made by any board of elections or of canvassers in counting the votes or declaring the vote of such election, &c.

It is, therefore, plain that section 159 provides for four classes of cases in which such recount may be applied for, viz.: (1) Where the error has been made by the district board of election in counting the vote. (2) Where the error has been made by such board in declaring the result. (3) Where the error has been made by the county board of elections, which constitutes the board of county canvassers, in

counting the vote. (4) Where the error has been made by such board in declaring the result.

The wisdom of this classification becomes strikingly apparent in the light of other provisions of the Election law to which we now turn for consideration. Section 103 provides that the county board of canvassers shall convene "on the Monday next after any such election," which is the sixth day after election. Section 105 provides that if a major part of such board shall not attend on that day, or if at that time the statements of the result of such election from every election district in such county shall not be produced, the board shall adjourn to some convenient hour the next day; and at the hour to which such adjournment shall have been ordered, the member or members of the board then present may proceed to canvass the vote, or may again adjourn for a period not exceeding three days, at which time the member or members of the board then present shall proceed to canvass the vote. Thus, it is observable that a situation might arise where a board of canvassers meet on the Monday next after the election, adjourn to Tuesday, and adjourn again to Friday, full ten days after election. It is also within the range of probability that the board might declare the result of the election on that day too late for an application for a recount to be made under section 159, which section requires that the application shall be made within ten days after the election, which limitation as to the time in which to make such application has been held to be mandatory by Mr. Justice Minturn in the *Van Noort Case*, 85 *Atl. Rep.* 813.

The legislature in order to make an application for a recount efficacious, and to prevent the prime object of the act from being circumvented by improper motives, very wisely refrained from making the granting of such application dependent upon the final result as declared by the board of county canvassers.

These views lead to the conclusion that the application for a recount and the order thereon were properly made.

Another objection urged by counsel for the prosecutor against the validity of the proceedings under review, is that the ballots were not recounted under the direction of the Supreme Court justice, in that the justice was not present, presiding at the recount. This objection is obviously the offspring of a misapprehension of what is meant by the statutory authorization of a justice of the Supreme Court to order and cause a recount to be publicly made under his direction by the county board of elections. Counsel for the prosecutor argue that this language implies that the recount should be made in the presence of the justice of the Supreme Court. But that is clearly not the general sense of the language used. What the language imports, obviously, is that the board in making the recount shall be subject to the direction of the justice. The statutory mandate that the recount shall be under the direction of the justice, simply puts a recount under his judicial control or direction. This direction may be properly exercised by the justice out of the presence of the board by an order, in writing, or verbally in the presence of the board. The statute does not require the presence of the justice during the progress of the recount. The settled practice is for the board of elections, in the absence of the justice, to count the ballots that they can agree upon by a majority vote, and as to those ballots that they cannot agree upon to count, by a majority vote, to lay them aside and refer them to the justice for his decision. This was the practice pursued in the present case and was proper.

Lastly, it is claimed by counsel for the prosecutor that the justice was without any jurisdiction to revoke the certificate of election granted by the county board of election to the prosecutor, and to issue in its place and stead a certificate of election to the defendant Ackerman, because of the fact that during the progress of the recount the term of office of the justice had expired, and an interval of two or three days had elapsed before the justice was reappointed, and it is on this situation that counsel bases the argument that the recount had during that interval was not, by force of the

Seglie v. Ackerman.

90 N. J. L.

circumstances mentioned, under the direction of a justice of the Supreme Court, as required by the statute, and that the vitality of the recount was extinguished simultaneously with the expiration of the term of office of the justice.

The fallacy of this position, which is apparent, arises from an unwarranted assumption, by counsel for prosecutor, that the power conferred upon the justice of the Supreme Court by the statute vests in him in his individual and not official capacity, and that, therefore, the life of the order and directions given under it became extinct when the official term of the justice, who made the order, expires.

Carrying out this assumption to its legitimate conclusion, it follows that where such justice resigns or dies during a recount or after it is concluded, and before any further action is taken to give proper effect to the recount, the entire proceedings taken become a nullity. As the applicant for a recount is barred from making a new application, under the statute, by reason of the limitation of time within which such application must be made, the applicant not only loses the benefit of the statute by having a recount of the votes, in which the general public has also an interest, in that the votes cast for a candidate shall be given their proper effect, but he is also saddled with the expense of such recount, which, in largely populated counties like Essex and Hudson, is very great, and, therefore, is more or less a factor to be considered in giving a reasonable construction to the act.

The duties conferred upon the justice by the statute are both of a judicial and ministerial nature. The order that he makes for a recount is a judicial order, and has the like force and effect as any other judicial order made by a court of competent jurisdiction, and that is, that the life of the order remains intact, unless the order be revoked or reversed by competent authority, until the purpose of the order has been fully achieved. The order, in this case, therefore, was in force during the recount made by the board on the days intervening between the expiration of the official term of the justice and his reappointment.

90 N. J. L.Seglie v. Ackerman.

We are unable to perceive any force to the contention of counsel for the prosecutor that the power conferred by statute upon the justice to grant a recount, to be had under the direction of the justice, is limited in its exercise by him in his individual capacity as such justice. Besides we think to uphold such a contention would be productive of incalculable mischief and chaos in the administration of justice. Moreover, we find nothing in the statute that countenances the construction contended for.

The legislative intent was not to confer the powers designated by the statute upon the individual, independent of the judicial office with which he is clothed, but, clearly, upon the judicial office, irrespective of the individual invested therewith.

The statute provides that the application for a recount may be made to any justice of the Supreme Court. The words, "such justice," which appear in subsequent clauses of the act do not necessarily limit the carrying out, with effect, the provision of the act to the justice of the Supreme Court who in the first instance granted the order for a recount.

The provisions of the act may be effectuated by any justice of the Supreme Court, whenever the justice who originally made the order for a recount has become incapacitated, resigned or died.

It is the duty of the court to construe legislative acts so that they are workable, whenever that can be properly done, for the purpose of effectuating their intent and spirit.

In the present case the order for a recount was made by the justice presiding in the Hudson Circuit; he gave directions for making the recount; his term of office expired while the recount was going on, and thousands of ballots had already been counted with great labor, patience and expense. After an interval of two or three days the justice was reappointed, and heard counsel engaged in the recount on disputed ballots which had been laid aside by the board and referred to him, as justice, for decision. His decision resulted in favor of the applicant for a recount, and there-

Meyer v. National Surety Co.

90 N. J. L.

upon he revoked the prosecutor's certificate of election and issued a certificate of election to the defendant Ackerman. The fact of a temporary vacancy in the office of justice of the Supreme Court, in the Hudson Circuit, according to the views above expressed, did not operate to nullify the recount, nor did it prevent the members of the board of election from pursuing the count, which had not yet been completed. It is not disputed that the board had full power to count the votes and refer all disputed ballots upon which they could not agree to the justice for decision. The justice who ordered the recount was reappointed, and, therefore, it cannot be justly said that the prosecutor was in any manner prejudiced by having the matter heard and determined by a justice who was a stranger to the earlier proceedings. Even if we adopt the view urged that the reappointment of the justice was the appointment of a new justice, as we regard the situation, it is of no importance whatever, for that may be truthfully said, in a certain sense, of a justice who is reappointed immediately upon the expiration of his term.

The reasons we have given lead to the result that the *certiorari* must be dismissed, with costs.

EMANUEL MEYER, RESPONDENT, v. NATIONAL SURETY
COMPANY, APPELLANT.

Submitted November 8, 1916—Decided March 6, 1917.

1. It is competent, for a reinsuring company to agree to be directly liable, to a policy holder, by the terms of the reinsurance agreement. In this case, the defendant company became directly liable to the plaintiff. A complaint, with the reinsurance agreement attached and made a part thereof, which alleges that the defendant company assumes all liabilities, &c., is sufficient.
2. A suit in the District Court between the same parties, to recover a balance due under a contract, is not *res adjudicata*, in a suit to recover for damages exceeding \$500, on a bond against the surety of the contract.

90 N. J. L.Meyer v. National Surety Co.

On appeal.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCHARD and BLACK.

For the respondent, *Edward R. McGlynn*.

For the appellant, *Gross & Gross*.

The opinion of the court was delivered by

BLACK, J. The plaintiff sued the defendant company in the Essex Circuit Court upon a bond and reinsurance agreement. The trial resulted in the direction of a verdict for the plaintiff, by the court, for the sum of \$826.50. An exception being noted, the propriety of the court's ruling is now before this court on appeal. The grounds of appeal, in brief, are the plaintiff's complaint discloses no cause of action, a judgment of the District Court is *res adjudicata* of the subject-matter of this suit, the court erred in refusing to direct a verdict in favor of the defendant, and also erred in directing a verdict in favor of the plaintiff. The case being somewhat complicated, a statement of the facts is essential, to a clear understanding of the points in the case under review. The plaintiff, as owner of certain buildings in East Orange, made a contract in writing with the Guarantee Waterproofing and Construction Company, to make the cellars watertight, for the sum of nine hundred dollars (\$900), with an agreement to furnish a three years' maintenance bond, in the sum of nine hundred dollars (\$900). Such maintenance bond was furnished by the Empire State Surety Company. Thereafter the Empire State Surety Company entered into a reinsurance agreement with the National Surety Company, the defendant, whereby the latter company assumed the liability of the former company, agreed to take its place and to fulfill all the obligations of the Empire State Surety Company. The proof showed, that up to the date of the bringing of the suit, the cellars of the buildings were not watertight, notice of the fact being given to the construction company and both surety

companies. No repairs having been made, the plaintiff brought suit, claiming damages. A motion was made to strike out the complaint and for a judgment for the defendant, which was denied by the Circuit Court, in a decision filed by the court December 16th, 1915. This motion was renewed at the opening of the case at the trial and again denied, repeated at the close of the case, on a motion to direct a judgment in favor of the defendant. The basis for these motions are practically the same as those set forth in the first ground of appeal before this court, viz., the plaintiff's complaint discloses no cause of action.

Some other important facts are that on July 30th, 1913, the plaintiff instituted a suit against the defendant company in the Essex Circuit Court. On motion, the complaint in that case was stricken out. On July 29th, 1914, on grounds that are not involved in the present discussion, the defendant company sued the plaintiff in the First District Court of Newark to recover \$300, the balance due the construction company under the agreement between that company and the plaintiff. The contract having been assigned to the National Surety Company January 5th, 1914, judgment was entered in that case for the plaintiff, in the sum of two hundred and twenty-six dollars and fifty cents (\$226.50). This raises the second ground of appeal, viz., that the suit in the District Court of Newark is *res adjudicata* of this suit. The suit under appeal was commenced December 12th, 1914. There is no ground of appeal challenging the correctness of the amount of the judgment, nor is it made the subject of argument in the appellant's brief.

It would serve no useful purpose to pursue the points of the appellant in detail, or to follow the elaborate brief filed in support of the first ground of appeal, viz., that the plaintiff's complaint discloses no cause of action. The complaint alleges that the defendant company assumed all liabilities under all the bonds given by the Empire State Surety Company, in accordance with the terms of an agreement made between the National Surety Company and the Empire State Surety Company; that by virtue of the reinsurance agree-

ment, which is annexed to and made a part of the complaint, the National Surety Company became liable to the plaintiff.

When a company reinsures all the risks and agrees that all losses ensuing under the policies shall be borne, paid and satisfied by the reinsuring company, it has been held, that a policyholder in the first company might maintain an action against the reinsuring company to recover a loss on property covered by a policy of the first company. *Johannes v. Phoenix Insurance Co. of Brooklyn*, 66 Wis. 50; 1 *May Ins.*, § 12; *Rich. Ins.* (3d ed.) 445; 14 *R. C. L.* 1452, § 618; 10 *L. R. A.* 424; 8 *L. R. A.* (N. S.) 862. It is always competent for the reinsuring company to agree to be directly liable to the original policyholder, as we read the reinsurance agreement—that is what the defendant company in this case agreed to do. The case cited by the appellant in our Court of Errors and Appeals, *Styles v. Long Company*, 70 *N. J. L.* 301, has no application to the facts under discussion.

By the reinsurance agreement the National Surety Company agrees to fulfill all the obligations of the Empire State Surety Company under the bonds and policies thereby reinsured against loss, as above stated, and agrees to adjust all claims arising under any of such bonds and such policies at its own expense, and to pay all valid claims arising as aforesaid, under said bonds and policies in accordance with their terms and conditions, &c. If the reinsurer assumes the risk, he may be sued directly by the original insured. 8 *L. R. A.* (N. S.) 862.

The fact that there was no schedule annexed to the reinsurance agreement or to the complaint, and that there is nothing to show that the bond in suit was one of those mentioned in the schedule, or covered by the reinsurance, is not important. If such be the fact, the burden of proving that fact is on the defendant.

The next point urged, and the only other one that needs any discussion, is, that the judgment of the First District Court is *res adjudicata* of the subject-matter of this suit—that is, that this precise controversy was definitely settled by the judgment of the District Court of Newark, and having

Syms v. West Hoboken.

90 N. J. L.

been once decided is finally decided. 7 *Words & Phrases* 6126. This cannot be so. The jurisdiction of District Courts, by statute, is limited to \$500. The Court of Errors and Appeals held, that the District Court cannot entertain jurisdiction of a notice of recoupment that claims more than \$500. *Ward v. Hauck*, 87 N. J. L. 198. This disposes of this point adversely to the appellant. There being no facts proved by the defendant, which raise an issue of fact for the jury to decide on the question of liability, the correctness of the amount of the judgment not being challenged, and therefore not considered, and finding no error in the record, the judgment of the Circuit Court is therefore affirmed.

GEORGE N. SYMS, PROSECUTOR, v. TOWN OF WEST HOBOKEN, IN THE COUNTY OF HUDSON, ET AL., DEFENDANTS.

Argued November 10, 1916—Decided March 6, 1917.

1. The Town of West Hoboken under *Pamph. L.* 1911, p. 531, ch. 250, has no authority to build a town hall.
2. The words in that statute, "other municipal purposes," under the rule of construction known as *ejusdem generis*, refers to buildings of the same class or of the same general character as those enumerated in the statute.

On *certiorari*.

Before GUMMERE, CHIEF JUSTICE, and Justices TRENCARD and BLACK.

For the prosecutor, *Frederick K. Hopkins*.

For the town of West Hoboken, *John J. Fallon*.

For Fagan and Briscoe, *Merritt Lane*.

The opinion of the court was delivered by

BLACK, J. The point involved in this case is whether the town of West Hoboken has authority to erect a town hall, designated as a building suitable for the use of the fire department, municipal offices and other municipal purposes, under *Pamph. L. 1911, p. 531, ch. 250*. Our examination of this statute leads us to the conclusion that the town of West Hoboken has no such authority thereunder.

Two ordinances were adopted by the town council of the town of West Hoboken, dated August 23d, 1916. The first provides for the erection of a building suitable for the use of the fire department, &c., and the purchase of land in addition to the land now owned by the said town whereon to erect said building, following the language of the statute above cited. *Pamph. L. 1911, p. 531*. The second ordinance authorized \$150,000 of municipal building bonds, in accordance with the Pierson act. *Pamph. L. 1916, p. 525*.

This *certiorari* challenges the legality of these ordinances and the proceedings thereunder. Authority for the ordinances under attack is contained in the act (*Pamph. L. 1911, p. 531*), "An act to authorize the erection, enlargement and equipment of engine houses and buildings for the protection of fire apparatus and for other municipal purposes, including police station houses, crematories for garbage, ashes and refuse and poor houses and buildings for the care of the sick poor in towns of this state and the purchase of lands whereon to erect said buildings; also the issuing of bonds to provide moneys for the purposes of this act." The pertinent part of the body of the act in the first section follows closely the wording of the title, which is: "The common council or other governing body of any incorporated town in this state are hereby authorized and empowered to erect one or more buildings suitable for the use of the fire department of said town and other municipal purposes or for use as police station houses, crematories for garbage, ashes and refuse and poor houses, and buildings for the care of the sick poor, and to purchase tracts of land whereon to erect said building or buildings; and in case such building or buildings shall have

been heretofore erected, to enlarge and equip the same and to purchase land in one or more localities whereon to erect said building or buildings," the aggregate cost not to exceed \$200,000. It will be observed, in the first place, that the term town hall is in common and almost universal use throughout New Jersey to designate the chief municipal building of a town, i. e., the place in which is transacted the public business of a town. This term is omitted in this statute, and, from a reading of the statute, it would seem to have been purposely omitted by the legislature. Thus, in the act of 1907, page 409 (4 *Comp. Stat.*, p. 5427, § 39), the words "town halls" are used both in the title and the body of the act authorizing the erection of such buildings. It is a fair inference to draw, that if the legislature had intended this act to confer authority to erect town halls, it would have used these well-known words, especially so in view of the previous act. *Pamph. L.* 1907, p. 409. The record shows, at the present time, the town of West Hoboken has a town hall, in which are located a council chamber and all the various town offices and departments.

The body of the act above quoted provides: "In case such building or buildings shall have been heretofore erected, to enlarge and equip the same." As applied to the town of West Hoboken, this language limits the power of the town council to an enlargement and equipment of the present building or buildings. It is a well-recognized rule, in the construction of statutes, that all the words in the statute must be given a meaning, when possible. The meaning of this statute contended for by the defendants would entirely ignore the clause of the statute above quoted. So, the rule of construction, known as "*ejusdem generis*," is invoked by the prosecutor—that is, where general words follow the enumeration of particular classes of persons or things, such as the words in this statute, "other municipal purposes," the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 *Cyc.* 1119; 3 *Words & Phrases* 2328; 6 *Id.* 5098, 5099; *In re Barre Water Co.*, 62 *Vt.* 29; 9 *L. R.* 1. 195; 6 *R. C. L.* 842, § 232;

90 N. J. L.

Syms v. West Hoboken.

Barracloff v. Griscom, 1 N. J. L. 193, 195. Chief Justice Beasley, speaking for the Court of Errors and Appeals, states the rule in these words: "General terms, following a specification of things of a particular class must be understood to refer to things of the same class, or at least of the same general character. The rule, as clearly established, is thus laid down: Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned." *Livermore v. Board of Freeholders of Camden*, 31 N. J. L. 507, 512.

As pointed out by the prosecutor, the town council, undoubtedly, has authority to build a town hall under the General Town act (*Pamph. L.* 1895, p. 218; 4 *Comp. Stat.*, p. 5518; *Pamph. L.* 1907, p. 409, ch. 168), but these acts require a submission to the voters of the town, while the act under which these ordinances were passed (*Pamph. L.* 1911, p. 531) has no such requirement.

For the reasons stated, we think there is no authority vested by this statute (*Pamph. L.* 1911, p. 531), in the town of West Hoboken, to build a town hall. The two ordinances brought up by this *certiorari* are therefore set aside, with costs.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY

NOVEMBER TERM, 1916.

CONSOLIDATED GAS AND GASOLINE ENGINE COMPANY, A CORPORATION, RESPONDENT, v. MICHAEL BLANDA, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

A general demand for a jury made two days before the time fixed for trial, whenever that may be, with proper notice to the clerk, is sufficient. The demand does not have to be for the return day or any particular day, but if given for a specific date, which would normally be the day for trial, it is valid if the required notice be served as directed by the statute.

On appeal from the Supreme Court, whose opinion is reported in 89 *N. J. L.* 104.

For the appellant, *Weinberger & Weinberger*.

For the respondent, *Herman Rust*.

Cons. Gas and Gasoline Engine Co. v. Blanda. 90 N. J. L.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court.

We think, however, it should be pointed out that this case differs from that of *James E. Crossley v. William H. Connolly Co.* (post p. 238), No. 92 of this term, opinion by Mr. Justice Minturn, in this court. In that case there was a proper demand for a jury at the day fixed for trial, and the trial was actually commenced before the jury which was empaneled. An adjournment was granted by the court on motion of the plaintiff's attorney. Upon the subsequent day set the court proceeded to hear and determine the cause without a jury, for the reason that none had been demanded for that particular day, and we held in the Crossley case that although no legislative provision has been made for the return of the same jury, nevertheless, as the plaintiff's request was not brought about by any fault of the defendant, the rights of the latter to the form of trial conceded by the statute, and which it had elected to adopt, should in nowise be jeopardized by the action of the court, and that neither the plaintiff's unwillingness to proceed, nor the trial court's recognition of his right to an adjournment, should operate to deprive the defendant of a right secured to it by law. The differentiating feature is, that in the case at bar an abortive demand for a jury trial was made for the return day of the summons, it being defective because notice was not given the clerk two days before the time fixed for trial, assuming the return day to be the time so fixed. On the return day, which was December 1st, 1915, there was no trial and an adjournment was had to December 8th, 1915, and no new demand for a jury trial was made in writing two days before that date. In this situation, the District Court properly proceeded to try the case without a jury, and the judgment rendered for the plaintiff is valid.

A general demand for a jury made two days before the time fixed for trial, whenever that may be, with proper notice to the clerk, is sufficient. The demand does not have to be for

90 N. J. L.

Fortein v. D., L. & W. R. R. Co.

the return day, or any particular day, but if given for a specific date, which would normally be the day for trial, it is valid if the required notice be served as directed by the statute.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

DESIRE FORTEIN ET AL., RESPONDENTS, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT.

Argued December 1, 1916—Decided March 5, 1917.

1. Where it appears from the evidence that the place where an accident happened was a portion of the ferry premises as actually used by a ferry company, and with respect to which, therefore, it was the duty of the company to exercise reasonable care to make the premises safe for the use of its passengers, it is not a defense in an action for damages resulting to a passenger from want of repair that the *locus in quo* was not within the premises demised to the ferry company.
2. Where an accident happens in another state and the injured party sues for damages resulting from that accident in a court of this state, and it is not shown that in the situation presented there could be no recovery as matter of law in the state where the injury happened, and there is sufficient evidence to go to the jury upon the question of damages having been sustained by the plaintiff, the *lex fori* governs.

On appeal from the Hudson County Circuit Court.

For the appellant, *Frederic B. Scott*.

For the respondents, *William F. Burke*.

Fortein v. D., L. & W. R. R. Co.90 N. J. L.

The opinion of the court was delivered by

WALKER, CHANCELLOR. This case presents an appeal from a judgment entered on a verdict of a jury in favor of the plaintiff, Desire Fortein, for personal injuries, and of her husband, Pierre Fortein, for loss of services and expenses incident to his wife's injury.

The defendant was a common carrier of passengers by ferry-boats plying between Hoboken, in this state, and a certain ferry-house at the foot of Christopher street, in the city and State of New York. The plaintiff Desire Fortein on a certain day became a passenger on one of the ferry-boats of the appellant, which she boarded at Hoboken and departed from it after it tied up at the ferry-house at Christopher street, New York. Upon leaving the boat, she walked along the passageway which had a plank floor and thereafter over an asphalt pavement, intending to go through a line of posts which marked the outward boundary of what was, apparently, the ferry premises, and the place from which trolley cars started. There were many other passengers, some in front and others behind her. The people were close around her, which necessarily obscured her view. Before reaching the posts, her foot got in a hole in the asphalt pavement and she fell, receiving injuries which were the subject of her complaint. Over this asphalt pavement, and extending to the line of posts, was a covered shed upon the front of which was displayed the name of the company and the word "entrance."

The underlying question is as to whether the place where the accident happened was a portion of the ferry premises with respect to which it was the duty of the defendant to exercise reasonable care to make them safe for the use of the plaintiff and other passengers. Not only was this place under the shed, and, as far as outward appearances were concerned, a portion of the ferry premises, but it was the way in which it was necessary for the passengers to cross upon entering the shed and alighting from trolley cars.

The grounds of appeal are two—*first*, because the trial court refused to direct a verdict in favor of the appellant, and *second*, because the trial court refused to charge certain re-

90 N. J. L.

Fortein v. D., L. & W. R. R. Co.

quests to the jury. It is unnecessary to particularize the subdivisions of the first ground. Such of them as are substantive will be treated of in the opinion. The second ground was not argued, and will therefore be considered to have been waived and abandoned and will not be considered in this court. *State v. Heyer*, 89 N. J. L. 187.

The Christopher street ferry property belongs to the city of New York and was the subject of a lease to the Hoboken Ferry Company, which was taken over by the appellant. The property leased includes the ferry-slip, piers and ferry-house structure, and extends from a point in the Hudson river easterly to the sea wall or bulkhead at which the ferry was located. From the bulkhead easterly into West street, New York, was the superstructure of the ferry-house building, and beyond the bulkhead, and under the ferry structure shed, were certain traffic posts owned by the appellant. These were placed on the asphalt pavement, which appellant claims is a continuation of the pavement of West street proper. It is in evidence that the employes of the appellant were accustomed to sweep up the entire asphalt pavement out to the row of posts through which, as already remarked, passengers to and from the ferry-boats were compelled to go. Even if the section of the asphalt where the accident happened was part of West street, New York, it was not obviously so. On the contrary, it appeared to be just the reverse, as it was under the ferry-house and inside of the sign "entrance" to the ferry.

The appellant claims that it was not obliged to repair the premises at the place where the accident occurred. Apparently, the *locus in quo* was not within the premises demised to the appellant; nevertheless, on the facts stated, it cannot be said, as matter of law, that there was no liability on the part of appellant. It appears from the evidence that the place where the accident happened was a portion of the ferry premises as actually used by the appellant, and with respect to which, therefore, it was the duty of the appellant to exercise reasonable care to make those premises safe for the use of its passengers, of whom the plaintiff Desire Fortein was one.

Fortein v. D., L. & W. R. R. Co.

90 N. J. L.

The decisions are quite uniform, to the effect that such a situation as above described created a liability for accidents happening by the ostensible owner's negligence.

In *Delaware, Lackawanna and Western Railroad Co. v. Trautwein*, 52 N. J. L. 169, it was held in this court that the duty of a railroad company as a common carrier of passengers does not end when a passenger is safely carried to the place of destination, but that the company must also provide safe means of access to and from its stations for the use of passengers, and the passengers have a right to assume that the means of access provided are reasonably safe.

In *Yetter v. Gloucester Ferry Co.*, 76 N. J. L. 249, Chief Justice Gummere, writing the opinion for the Supreme Court, commenting upon *Delaware, Lackawanna and Western Railroad Co. v. Trautwein*, remarked that the rule there enunciated applied, of course, to ferry companies as fully as to railroad companies; that the duty as to safety of landing applies not only to the immediate means of getting on and off the boats, but requires a ferryman to use care to furnish passageways between the ferry-house and the street; that to the same effect was *Exton v. Central Railroad Co.*, 62 N. J. L. 7; *S. C. on error*, 63 *Id.* 356, where it was held that the company was liable for injuries resulting to the plaintiff from the unsafe condition of the walkway outside of its ferry-house, which was provided by the company for the use of travelers to its ferry-boats and railroad trains.

The defendant, in *Yetter v. Gloucester Ferry Co.*, contended that the general rule, just stated, was not applicable in that case, for the reason that the pier at which it discharged passengers did not belong to it, but to another company. The Chief Justice held that the ownership of the pier, however, was immaterial so far as the defendant's liability was concerned, that it was the landing place supplied by it to the plaintiff, and it owed her the duty of using care to see that it was safe for her use. The doctrine thus enunciated has equal application to a way under a ferry shed leading to a street, which, though it may be part of the street, is under the shed and inside of the sign of the ferry company labeled

90 N. J. L.

Fortein v. D., L. & W. R. R. Co.

"entrance," and used by the passengers of the company in going to and from the ferry-house—especially when it is the only way provided or usable for the purpose.

The appellant contends that as the accident to the respondent happened in the State of New York, the duties and obligations of the appellant must be measured by the law of that state. The doctrine contended for, as applied to the case at bar, concerns only the question as to whether or not there was sufficient evidence to go to the jury upon the question of damages having been sustained by respondent, and this question, as has been decided by this court, is governed by the *lex fori*. *Ferguson v. Central Railroad Co.*, 71 N. J. L. 647. The New York cases cited in the brief of counsel for appellant on this head do not show that in the situation presented in the case at bar, there could be no recovery by respondents, as matter of law, in the courts of that state. Besides, it was held by our Supreme Court in *Ackerson v. Erie Railroad Co.*, 31 N. J. L. 309, that an action will lie in this state for a tort to the person committed in another state. In that case the plaintiff was injured by the carelessness of the defendant while riding in a car on its railroad in the State of New York, and it was held that the action was transitory and that it was well brought in this state.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

THOMAS McMICHAEL, APPELLANT, v. HARRY HORAY ET AL., RESPONDENTS.

Submitted December 11, 1916—Decided March 5, 1917.

1. Where one party recovers judgment against another and the defeated litigant commences suit against his adversary for damages for an alleged conspiracy, and the procuring of false testimony to be given, in the very suit in which the recovery was had, these matters, having been available as defences in the suit and on rule to show cause why a new trial should not be granted, cannot be made the basis of recovery—the doctrine of *res adjudicata* being applicable.
2. A court of appeals need not, but may, decide questions on a record before it which were not raised in a court below; and it is the constant practice of appellate courts to notice and decide on questions of jurisdiction and public policy, without those questions having been raised below.
3. A court of appeals may affirm a judgment, on ground other than that upon which the decision was rested in the court below, if the decision be correct.

On appeal from the Supreme Court.

For the respondents, *Scovel & Harding*.

For the appellant, *Jess & Rogers*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The respondents, Harry Horay, Joseph G. Moore and John M. Barefoot, brought suits in the Camden District Court against the appellant for damages sustained as a result of the trespass of appellant's cattle upon their respective lands. The suits were brought at the same time, tried together before one jury, which returned a verdict against the plaintiff in the sum of \$600, of which \$300 was apportioned to Horay and \$150 each to Barefoot and Moore. The District Court denied appellant's application for a new trial, but reduced the amount of the verdict from \$600 to \$500, and executions were issued upon the

judgments which the appellant sought unsuccessfully to restrain by injunction out of the Court of Chancery. Upon filing the bill in that court, an order was made upon the respondents to show cause why an injunction should not be issued with an *ad interim* stay, and, upon hearing, an order was made for the issuance of an injunction *pendente lite*. The appellant, defendant in the executions, applied for new trials of the cases in the Camden District Court, which court denied the application. The appellant had instituted a suit at law in the Camden Circuit Court against the respondents for damages for an alleged conspiracy in bringing their suits in the Camden District Court against the appellant for damages alleged to have been sustained by them as a result of the trespass of appellant's cattle (which was the gravamen of their suits against him) by grossly exaggerating their losses and procuring false testimony to be given to secure recovery of excessive damages. The suit for damages for fraud and conspiracy, in which appellant, defendant in the executions, hoped to recover judgment against the respondents and set it off against their judgments, was nonsuited in the Camden Circuit Court, and a motion to vacate the nonsuit was subsequently denied. Application was then made to the Court of Chancery to dissolve the injunction, which was granted, and the appellant appealed to this court, and moved in the Court of Chancery for a stay of its order dissolving the injunction, pending appeal. That court granted the stay until application could be made to this court for that purpose. On such application this court held that by applying to the law courts—*first*, to the District Court for new trials of the suits there, and *secondly*, to the Circuit Court to vacate its judgment of nonsuit, appellant must be held to have elected to stand upon his legal remedy, and should abide the result, and denied the motion for a stay pending appeal, which appeal has never been brought to hearing. See *McMichael v. Barefoot*, 85 N. J. Eq. 139.

The appellant, after moving for the stay in this court, brought suit against the same defendants in the Supreme Court, grounded upon the same matter that was his cause for

action in the Circuit Court, in which he had been nonsuited. On moving the Supreme Court suit at the Camden Circuit, plaintiff was nonsuited upon the opening of his counsel upon the ground, as the trial judge put it, that no facts were stated from which an innocent motive could not be as readily inferred as any other, and that the facts expected to be proven were insufficient to sustain an action of the character stated in the complaint.

The thing most prominently appearing upon the state of the record before us is that the appellant is precluded from recovery by estoppel of record, that is, by the judgments recovered against him in the three suits by the respondents in the Camden District Court. These judgments operate to defeat the appellant's present suit *res judicata*. It is true that the respondents' suits against the appellant were for damages for trespass, and that appellant's present suit against respondents is for damages for alleged conspiracy, and the procuring of false testimony to be given in the very suit in which the recovery by the respondents against the appellant was had. These matters alleged and relied upon by the appellant were available to him as defences in the trespass suits brought by the respondents. It may be that he was surprised by the testimony on the trial. If so, that fact could be availed of on a motion for a new trial, and, in fact, as we have seen, a motion for a new trial was made and denied.

Vice Chancellor Van Fleet, in *City of Paterson v. Baker*, 51 N. J. Eq. 49, quoting from *Cromwell v. Sac County*, 94 U. S. 351, said (at p. 53 of 51 N. J. Eq.) that parties and those in privity with them are concluded, not only as to every matter offered and received to sustain or defeat the demand, but as to any other admissible matter which might have been offered for that purpose; for example, a judgment rendered upon a promissory note is conclusive as to its validity and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, &c. Again, the

90 N. J. L.

McMichael v. Horay.

same vice chancellor, in the same case, quoting from *Beloit v. Morgan*, 7 Wall. 619, said (at p. 56 of 51 N. J. Eq.) that the judgment of a court having jurisdiction of the parties and the subject-matter of the suit is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different. The doctrine of the *City of Paterson v. Baker* was approved by the Court of Errors and Appeals in *In re Walsh's Estate*, 80 N. J. Eq. 565, 569, 570.

It is true that the judgments recovered by the respondents against the appellant in the Camden District Court were not pleaded as estoppel in bar to the appellant's action against them in the Supreme Court, the judgment of nonsuit in which is now being reviewed.

This court held in *State v. Heyer*, 89 N. J. L. 187, that a question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal.' But this must be read in the light of our holding in *State v. Shupe*, 88 *Id.* 610, where it was decided that a court of last resort need not hear a party on a question which could have been, but was not, raised in an intermediate court of appeal, except where the question goes to the jurisdiction of the subject-matter or where a question of public policy is involved. The true doctrine is that a court of appeals need not, not that it cannot, decide a question arising on a record before it, which was not raised in a court below, whether that court be an intermediate court of appeals or a court of first instance; and it is the constant practice of appellate courts to notice and decide questions of jurisdiction, and especially questions of public policy, residing in records before them, without those questions having been raised below.

The doctrine of *res judicata* is one of public policy. On this phase of the question Vice Chancellor Van Fleet remarked in *City of Paterson v. Baker*, *supra* (at p. 59 of 51 N. J. Eq.):

"The doctrine under consideration is not a mere rule of procedure, limited in its operation, and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him, but a rule of justice, unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation and repose of society."

In the case before us the motion to nonsuit was not made upon the ground of estoppel by record, nor were the judgments pleaded as *res judicata*, nor was the nonsuit granted for that reason; but that makes no difference, as a judgment entered upon a nonsuit directed by the trial judge, and brought up for review, will be affirmed if correct on any legal ground, although the reason given by the court below is erroneous. *Gillespie v. J. W. Ferguson Co.*, 78 N. J. L. 470. We have not considered, and therefore do not decide, whether the ground upon which the trial judge rested the motion to nonsuit is tenable or untenable. We prefer to put our decision upon the ground of public policy, which, for the repose of society, decrees that judgments rendered by competent tribunals, having jurisdiction of the subject-matter and the parties, shall be forever at rest.

The judgment under review must be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

90 N. J. L.

Shaw v. Bender.

MARY SHAW, RESPONDENT, v. ELLA A. BENDER, APPELLANT.

Submitted July 10, 1916—Decided March 5, 1917

1. Whenever words clearly sound to the disreputation of the plaintiff they are defamatory on their face and actionable *per se*.
2. A suit lies for words actionable *per se* without proof of special damage.
3. Conflicting testimony is always for the jury.
4. A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal.
5. The present practice requires that a defendant's answer must specifically state any defence which, if not stated, would raise issues not arising out of the complaint.

On appeal from the Atlantic County Circuit Court.For the appellant, *Bolte, Sooy & Gill*.For the respondent, *Lee F. Washington*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The plaintiff sued the defendant for damages for slander. The complaint contained two counts—*first*, that on November 6th, 1914, in the county of Atlantic, the defendant, in the presence of Rose Scanlan, William Colligan and other persons, said to, and of, and concerning, the plaintiff: "You (meaning the plaintiff) bring that sign back you stole last night, you and Col. Kelly * * * you are a God damn liar, you stole it out of that window last night * * * you are nothing but a thief, you stole my chair * * * you stole part of my new range * * * you stole the gas light out of the dining-room," thereby stating that the plaintiff was a thief and guilty of the crime of larceny; *second*, at the same time and place, in the presence of Rose Scanlan and William Colligan and other persons, defendant said to, and of, and concerning, the plaintiff: "You

Shaw v. Bender.

90 N. J. L.

(meaning the plaintiff) are nothing but a common low prostitute * * * you are so God damn low you don't know what you are * * * you are a liar * * * he (meaning Col. Kelly) lives with you," meaning thereby that the plaintiff was unchaste, subject to the punishment inflicted upon common prostitutes, and that the plaintiff was guilty of the crime of adultery or fornication with Kelly. Plaintiff alleged that the words were false and malicious and demanded damages.

Defendant answered, first, that there was no allegation in either count that the words spoken, or any of them, were used in a defamatory sense, and, further, that no special damage was alleged to have resulted to the plaintiff as a consequence of the words alleged to have been spoken, and that for want of such averments no cause of action was declared; second, that the several allegations in the counts were wholly false in fact and untrue.

The action was tried in the Atlantic County Circuit Court before Mr. Justice Carrow and a jury, and resulted in a verdict in favor of the plaintiff and against the defendant, upon which judgment was duly entered, with costs.

The defendant appealed to this court from the whole of the judgment, first, because the trial court refused the defendant's request to nonsuit the plaintiff at the close of her case; second, because the court refused to nonsuit at the close of the defendant's evidence, and third, because the court erred in charging the jury in certain particulars.

1. As to the motion to nonsuit: The plaintiff testified that on November 6th, 1914, in the defendant's house, in Atlantic City, in the presence of the defendant's brother, Mr. Colligan, and of Mrs. Scanlan and several others, she, the defendant, said to the plaintiff: "You God damn thief, you stole my sign, I want you to bring that sign back you stole last night. I said, Now you be careful who you are talking to, I didn't steal your sign. You are a God damn thief, you stole my sign, you stole my gas jets, you stole part of my new stove. You are nothing but a God damn thief. She said I was so low I didn't know what I was, and she said I was nothing but a God damn common low prostitute. * * * She said Col.

90 N. J. L.Shaw v. Bender.

Kelly and I stole the sign last night. I said, I didn't see Col. Kelly last night. She said, You are a God damn liar; he lives with you." This story was corroborated by Mrs. Scanlan, who went with Mrs. Shaw to Mrs. Bender's. In this state of the proofs, the plaintiff rested and the defendant moved for a nonsuit, the only ground approaching a reason therefor being counsel's assertion that there was no damage alleged or proved. The court thereupon allowed the plaintiff to amend her complaint in certain respects requested by her attorney, namely, by alleging that as a result of the language used, the plaintiff was injured in her reputation and standing in the community, and that the making of the statements damaged the plaintiff in her business as a boarding-house keeper, and as a result of the speaking of the words the plaintiff was humiliated in her feelings as well as by the indignity of having the words spoken. The motion to nonsuit was denied, with leave to renew it at the end of the case.

Whenever words clearly "sound to the disreputation" of the plaintiff, there is no need of further proof, they are defamatory on their face and actionable *per se*. *Odq. L. & S.* *18. Spoken words are defamatory when the imputation cast by them on the plaintiff is on the face of it so injurious that the court will presume, without proof, that plaintiff's reputation has been thereby impaired, and one of the class of cases in which this presumption arises is where the words charge the plaintiff with the commission of a crime. *Ibid.* *53. Assuming that the defendant uttered the words alleged to have been spoken of and concerning the plaintiff, she charged her with the commission of two crimes, namely, larceny and adultery or fornication, each of which is indictable under our statute. It is actionable to call one a thief, and no innuendo at all is necessary, as larceny is clearly imputed. *Ibid.* *105. Equally, it is actionable to call a woman a prostitute, and no innuendo is necessary, as adultery or fornication is implied, accordingly as the woman is married or unmarried. A suit lies for words actionable *per se* without proof of special damage. *Johnson v. Shields*, 25 N. J. L. 116.

Shaw v. Bender.

90 N. J. L.

It is specified as cause for reversal that a nonsuit should have been granted because the statements of the defendant were directed to the plaintiff personally and to no one else, hence, the element of publication, which is the foundation of slander, was lacking. The trial court was not requested to grant a nonsuit on that ground; hence, the question is not before us for determination.

A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal. *State v. Heyer*, 89 N. J. L. 187.

2. As to the motion to nonsuit at the close of case: Mrs. Bender, the defendant, took the witness stand and testified that she never called Mrs. Shaw a thief or a prostitute. Mr. Colligan, defendant's brother, testified that he saw there was commotion in his sister's house and went in and got between the women; that he did not hear his sister say anything, only heard Mrs. Shaw's tongue above them all. Other witnesses were called who also gave only negative testimony, saying they did not hear Mrs. Bender use the slanderous language attributed to her.

When the testimony was closed, counsel for the defendant addressed the court and said: "I am inclined to think that this case ought to be dismissed without debate." The trial judge, regarding this as a renewal of the motion to nonsuit, which he had reserved, and treating it as a motion to direct a verdict for defendant, denied it, and the case went to the jury who found for the plaintiff.

The action of the trial judge was clearly right. The testimony for the defendant did no more than put the facts in dispute and thus raise a jury question. Conflicting testimony is always for the jury. *Dickinson v. Erie Railroad Co.*, 85 N. J. L. 586.

3. Among the causes for reversal assigned by the appellant are three alleged errors committed by the trial judge in charging the jury, but, as no exception was taken to any part of the charge, these reasons for reversal are not available to appellant here.

90 N. J. L.

Sholes v. Eisner.

4. It is argued in the brief of the appellant that the alleged slander was privileged. Privilege is not pleaded nor is it assigned as a reason for reversal. Counsel for respondent makes the point that the question of privilege should not be considered by the court, inasmuch as it was not specially set up by the defendant in her answer. This is correct. The present practice requires that a defendant's answer must specifically state any defence which, if not stated, would raise issues not arising out of the complaint. The present case is within this provision. And in a case where defences are not so pleaded they are not available on appeal. See *Titus v. Pennsylvania Railroad Co.*, 87 N. J. L. 157, 161. Besides, the point is not available here, for the reason that the other ones not raised below are not.

The judgment must be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, JJ. 12.

For reversal—None.

ANNA E. SHOLES, RESPONDENT, v. LEO EISNER ET AL.,
APPELLANTS.

Submitted December 11, 1916—Decided March 5, 1917.

1. Because the plaintiff did not produce affirmative proof that his judgment debtor, who petitioned for discharge under the Insolvent Debtors' act, did not appear in person at every subsequent court until discharged, the motion to nonsuit should have been granted, and failing that—this lack of evidence not having been supplied in the further progress of the trial—the motion to direct a verdict should have been granted; and, therefore, the direction of a verdict for the plaintiff was erroneous.

Sholes v. Eisner.

90 N. J. L.

2. The defendant having appeared at the term of the Common Pleas Court, next after presenting his petition, and having been then and there examined, and the court, which could have granted his discharge within that term, held the matter under advisement until a subsequent term and then granted it, the discharge, when so granted, operated to discharge the debtor's sureties on the bond, because the court could not lawfully have granted the discharge unless it were satisfied that the debtor's conduct had been fair, upright and just, which, perforce, must include compliance with the terms of the act which alone would entitle the debtor to his discharge, and which, the discharge, necessarily presupposes that there had been no breach of the condition of the bond.
3. The discharge of an insolvent debtor is a release by act of law from performance of the condition of the bond.
4. It is a general rule that the discharge of the principal works a discharge of the sureties on a bond.

On appeal from the Supreme Court.

For the appellants, *James & Malcolm G. Buchanan.*

For the respondent, *James J. McGoogan.*

The opinion of the court was delivered by

WALKER, CHANCELLOR. This case comes here on an appeal by appellants from a judgment of the Supreme Court, in favor of the respondent. The grounds of appeal are (1) the refusal of the trial court to nonsuit the plaintiff; (2) the refusal to direct a verdict for defendant; (3) the direction of a verdict for plaintiff.

The action was brought by plaintiff for the alleged breach of a bond under the Insolvent Debtors' act, made by defendants as sureties for Benjamin Markowitz. The bond was given December 17th, 1914, and was conditioned *inter alia* that Markowitz should appear before the then next Common Pleas Court of Mercer county, and petition for the benefit of the act, and appear in person at every subsequent court until discharged. The next term of the Mercer Pleas after the giving of the bond was the January term, 1915. Markowitz duly appeared and petitioned. The breach alleged is

90 N. J. L.Sholes v. Eisner.

that the said "Benjamin Markowitz named in the said bond, did not appear in person before the Court of Common Pleas holden in the county of Mercer, during the May (1915) term thereof, as provided therein." This was denied by defendants' answer, and the only evidence offered by plaintiff to prove the alleged breach was the offer of the minutes of the Common Pleas, which contained no entry or record to show whether or not Markowitz appeared before that court during the May (1915) term.

The minutes were kept by various persons and were shown to be incomplete, for they contained no entry of the appearance and examination of the insolvent debtor on his petition, although such appearance and examination were duly had. This lack of evidence was not supplied in the further progress of the trial; yet the court denied the defendants' motion to nonsuit and to direct a verdict for defendants, and, on the contrary, directed a verdict for plaintiff. All of which was erroneous.

The defendants adduced testimony tending to show that Markowitz had in fact appeared in person at the May (1915) term of the Common Pleas; and, also, adduced testimony tending to prove a waiver and abandonment by plaintiff of her right to require the further appearance of Markowitz in the insolvency proceedings. But in our view of the case, it is not necessary to consider these questions of evidence.

As already stated, the next term of the Mercer Pleas after the giving of the bond was that of January, 1915, at which it is admitted Markowitz appeared and presented his petition for discharge and was examined. It is also admitted that the Mercer Pleas on February 18th, 1916, made an order discharging the insolvent debtor in customary form, and on the same day appointed an assignee for him, and that he, the debtor, thereupon made a deed of assignment to the assignee.

The act for the relief of persons imprisoned on civil process, commonly called the Insolvent Debtors' act (*Comp. Stat.*, p. 2824), provides in section 11 that if the court, after hearing, shall be satisfied that the conduct of the debtor has

been fair, upright and just, it shall proceed to appoint one or more assignees to whom the debtor shall forthwith execute an assignment of all his real and personal estate, &c., and upon making which assignment and filing the same, the court may direct the sheriff to discharge said debtor from confinement on account of any debts by him previously contracted. It is provided in section 3 that any person arrested on process of execution, &c., as provided in section 2, having given bond as therein provided, shall be entitled to make application for his discharge under the act. The discharge, if granted, is from confinement on account of any debts previously contracted. The form of the order of discharge is not printed in the state of the case, but it is stipulated that the order therefor was in customary form. The customary form must, in its nature, be one in conformity to the statute. Therefore, the defendant has been discharged from confinement on account of any debts by him previously contracted, including the plaintiff's demand. It would be anomalous, indeed, if the defendant may be discharged from confinement on such demand, and, consequently from his liability on the insolvent bond on the one hand, and his sureties on the other hand, should be held for the payment of the debt, when their undertaking was to be answerable for it only in case he should not comply with the insolvent laws, and, therefore, not entitled to his discharge. This does not lay out of view the fact that the bond required that the debtor would appear in person at every subsequent court until he should be duly discharged, as a discharge by the Common Pleas necessarily includes a finding that the conduct of the debtor has been fair, upright and just. These requirements are restricted to the debtor's conduct in the insolvency proceedings (*Meliski v. Sloan*, 47 N. J. L. 82), and it is not perceived how this debtor could have been fair, upright and just with reference to these proceedings, without having in all things complied with the requirements of the insolvency laws, including appearance in person in court when required to do so. The form of the bond given in this case follows the statutory language contained in section

2 of the act, and concludes, "then the above bond or obligation shall be void and of no effect; otherwise to remain in full force and virtue." In other words, if the insolvent debtor complied with the requirements of the insolvent laws, the bond was to be void and of no effect; that is to say, there was to be no liability on the part of the insolvent debtor's sureties to pay his debt.

So far as appears, there was no impediment in the way of the court's making an order for the discharge upon the day of the examination of the debtor, or at least within a short time thereafter, certainly within the term, for the examination took place on February 18th, and the term did not end until the second Tuesday of May following, that is, May 9th, 1916. It was not until the third term thereafter that the assignee was appointed and the debtor discharged. This delay was not the fault of the debtor, but resulted from the action of the court. For this the debtor should not suffer.

In *Stokes v. Hardy*, 71 N. J. L. 549, at the hearing and examination of the debtor, objection was made to the further prosecution of the matter on the ground that the defendant's petition had not been filed in compliance with the act. The petition was presented to the court on the 7th of April, 1903, but was not filed in the clerk's office until November 30th following, it having apparently been retained in the possession of the judge during the intervening period. The Common Pleas overruled the objection and at the close of the hearing made an order that Hardy be discharged. After *certiorari* proceedings, in which the order of discharge was set aside in the Supreme Court with direction that the bond should be taken from the files for prosecution, that judgment was removed into this court on error, and Chief Justice Gummere, writing the opinion, observed (at p. 551) that after the presentation of the petition, the judge who was sitting should, within a reasonable time, have deposited it in the office of the clerk, where the records and files of court were kept, but that the failure of the judge to do that was something for which Hardy was in no way responsible, and that the Common Pleas Court very properly re-

Sholes v. Eisner.

90 N. J. L.

fused to punish Hardy for its own failure to deposit the petition. The doctrine of this case clearly extends to the one at bar. Markowitz, the insolvent debtor, certainly had a right to presume that his application would, within a reasonably short time, be considered and decided, and he certainly was not responsible for the fact that it was held under advisement for three succeeding terms, and when the court at last gave him his discharge, which it could only have lawfully done upon his compliance with the act, that discharge must certainly be as efficacious as though made on the day the matter was submitted to the court.

In *St. Vincent's Church v. Borough of Madison*, 86 N. J. L. 567, it was held that when an application for a writ of *certiorari* was made within the time prescribed by statute but allowed out of time, the writ would not be invalid, because a justice of the Supreme Court has a constitutional right to deliberately consider all applications made to him and take the same under advisement, and that if the delay in entering a judgment or order be caused by action of the court, the entry will be allowed *nunc pro tunc* as of the time when the party would otherwise have been entitled to it, as it is a rule of practice, as well as of common justice, that the action of the court should not be permitted to work an injury to a party. This doctrine is universal. It was applied in the Court of Chancery in *Grant v. Grant*, 84 N. J. Eq. 81. It extends to every court of general jurisdiction, of which the Court of Common Pleas is one.

The view that when a debtor has been discharged by the Common Pleas under the Insolvent Debtors' act, that discharge by virtue of the statute shall operate to discharge the debtor's sureties on the bond, finds strong support in the case of *Young v. Young*, 45 N. J. L. 197, wherein Chief Justice Beasley said (at p. 200):

"It thus appears that the legislature has, by explicit and plain expression, declared that the decree shall order that all claims which have not been presented within the time limited in the rule shall be barred, and that such decree shall have the effect of barring such unrepresented claims, and

90 N. J. L.

Sholes v. Eisner.

therefore this court has not the competency to push aside this regulation and to say that claims not so put in shall be suable."

The doctrine of the Young case, applied to the case at bar, would indicate that when the legislature provided that an insolvent debtor should be discharged from arrest provided he made out and delivered to the officer a true and perfect inventory, &c., of all his goods, &c., and should give bond to the plaintiff at whose suit he was arrested, with sufficient surety, with condition required by the statute, and provided further that if upon hearing of his application for discharge the court should be satisfied that his conduct had been fair, upright and just—which, perforce, must include compliance with the terms of the act, which alone would entitle him to a discharge—and then discharges him from confinement on account of the very debt for which he was arrested, that discharge must necessarily presuppose that there had been no breach of the condition of the bond, and that, of course, would operate to discharge the sureties from their obligation. It has been decided that the discharge of an insolvent debtor is a release by act of law from performance of the condition of the bond. *Skillman v. Baker*, 18 N. J. L. 134, 138; *Kirby v. Garrison*, 21 *Id.* 179. And it is a general rule that the discharge of the principal works a discharge of the sureties on a bond. There is nothing in the record before us to take this case out of the general rule.

The judgment will be reversed, to the end that a *venire de novo* may be awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

Dickinson v. D., L. & W. R. R. Co.90 N. J. L.

EDNA DICKINSON, RESPONDENT, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT.

Argued November 24, 1916—Decided March 5, 1917.

1. In an action brought to recover damages for a nuisance created and maintained by the defendant in the building of an embankment along a public highway, thereby interfering with plaintiff's full use of the highway, the recovery by the plaintiff must be confined to the damage sustained up to the time of the commencement of the suit, for the reason that since the creation of the obstruction was an illegal act it is not to be assumed that the unlawful condition created was a permanent one, no matter what the character of the obstruction might be. In such a case a prior recovery does not preclude a recovery for damages sustained because of the continuance of the obstruction after the commencement of the prior action.
2. The general rule that a person suffering from a nuisance created by another is under a duty to take proper measures for the lessening of the damages resulting therefrom, is not so far reaching in its effect as to relieve the wrong-doer from the responsibility for the existence of such conditions and to impose it upon the innocent sufferer by requiring him to assume that the creator of the nuisance will continue indefinitely to maintain it in violation of law, and, upon this assumption, oblige him to alter or add to the buildings upon his property for the purpose of adapting it to those conditions.
3. When, in an action for damages, the fundamental question involved was whether or not a structure, maintained by the defendant, was a nuisance, and the question was resolved in favor of the plaintiff, the matter is *res judicata* between the parties in all subsequent litigation arising out of the maintenance of the structure.
4. There is nothing in section 30 of the Railroad act (*Pamph. L. 1903, p. 661*) which permits a railroad company and a municipality to agree that the former shall erect and maintain a nuisance in a public highway.

On appeal from the Supreme Court.

For the appellant, *Frederic B. Scott*.

For the respondent, *Ralph E. Lum*.

'The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This action was brought to recover damages for a nuisance created and maintained by the defendant company in the building of an embankment and wall along a public highway in the borough of Chatham upon which the plaintiff's property abutted, thereby interfering with her full use of the highway, and making ingress to and egress from her premises more difficult. The trial resulted in the rendition of a verdict in favor of the plaintiff. The railroad company appeals from the judgment entered thereon.

The first ground of appeal is rested upon the proposition that the damages resulting to the property of the plaintiff having been made the subject-matter of a prior litigation between the same parties, her recovery in that litigation was a recovery once and for all, because of the permanent character of the illegal structure, and barred her from maintaining any subsequent action for damages arising out of the continued maintenance thereof by the defendant.

It appears from the record before us that at the trial of the first suit the jury was limited to a consideration of the damages sustained by the plaintiff from the time of the commission of the wrongful act complained of up to the commencement of the action; and that its award was restricted by the court to compensation for the loss sustained during the period mentioned. It is plain, therefore, that if appellant's contention is sound, the respondent has not received, and now never can receive, full compensation for the damage done to her property from the continued maintenance of the unlawful structure.

Although the precise question presented by this ground of appeal seems not to have been heretofore considered by this court, it has been dealt with in a number of cases decided by our Supreme Court. In *Lewis v. Pennsylvania Railroad Co.*, 76 N. J. L. 220, the facts were as follows: The defendant company had elevated its tracks through the city of Elizabeth. As an incident to the improvement, and for the purpose of carrying the elevated structure over Mary street, it unlawfully lowered the grade of that street to the detriment

Dickinson v. D., L. & W. R. R. Co.

90 N. J. L.

of the plaintiff's property which abutted thereon. It was held that the recovery by the plaintiff must be confined to the damage sustained by him up to the time of the commencement of the suit, for the reason that since the change of grade was an illegal act, it is not to be assumed that the unlawful condition created was a permanent one, no matter what the character of the alteration of grade might be. In the earlier case of *Hatfield v. Central Railroad Co.*, 33 *Id.* 251, the same rule was declared, where the defendant company had unlawfully laid its railroad tracks within the limits of a public street, and maintained them there, without taking any steps to legalize its occupation of the street under the powers given it in its charter. To the same effect are *Brewster v. Sussex Railroad Co.*, 40 *Id.* 57; *Collins v. Langan*, 58 *Id.* 6, and *Ackerman v. Nutley*, 70 *Id.* 438. These decisions, in our opinion, lay down the correct rule and demonstrate the unsoundness of appellant's contention.

Another ground of appeal urged before us is that the trial court improperly overruled questions upon the cross-examination of a witness produced by the plaintiff, the purpose of which was to show that by a rearrangement of the inside of her building by the plaintiff, and the construction of a stairway upon its outside, the diminution in rental value and convenient user caused by the presence of the elevated structure could be largely obviated. We observe that the exclusion of some of the questions discussed by counsel in his brief was not objected to by him, and, consequently, the rulings of the court upon them constitute no ground for reversal. Assuming that the rulings which were made the subject of objection present the matter discussed by counsel, we consider the judicial action complained of to have been legally unobjectionable. The general rule that a person suffering from a nuisance created by another is under a duty to take proper measures for the lessening of the damages resulting therefrom, has never been considered to be so far reaching in its effect as to relieve the wrong-doer from the responsibility for the existence of conditions like those exhibited in the present

case, and to impose it upon the innocent sufferer, by requiring him to assume that the creator of the nuisance will continue indefinitely to maintain it in violation of law, and upon this assumption oblige him to alter or add to the building upon his property for the purpose of adapting it to those conditions.

The last ground of reversal attacks the ruling of the trial court refusing to permit the appellant to put in evidence an agreement made between it and the borough of Chatham, the object of which was the elimination of grade crossings by the elevation of the appellant's right of way; this agreement being alleged to have been made under the authority of section 30 of the act concerning railroads (Revision of 1903). The purpose of the offer, as stated by counsel at the time when it was made, was to show that the appellant had a legal right to elevate its road through the borough of Chatham in conformity to the provisions of that contract, and justified the appellant in its occupation of the described portion of the public way adjacent to the plaintiff's premises. In other words, that the structure complained of is authorized by law, and, therefore, cannot be a nuisance. The trouble with appellant's present contention is that the fundamental question in the prior litigation was nuisance *vel non*, and this question was resolved in favor of the plaintiff; and, consequently, in all subsequent litigations arising out of the maintenance of the structure, the matter is *res judicata* between the parties. If the alleged contract had the force and effect now ascribed to it, and the appellant desired to take advantage thereof, it should have been produced and offered in evidence at the trial of the former suit. Having failed to do this, the company cannot now put it in evidence for the purpose of overriding the effect of the judgment in the earlier litigation.

It has been suggested that the contract was evidential for the purpose of demonstrating that the structure complained of was a permanent one; that the nuisance could not be abated; and that, therefore, the recovery had in the original suit must have been once and for all.

Dickinson v. D., L. & W. R. R. Co.90 N. J. L.

We think there are several answers to this suggestion. In the first place, the contract was not offered upon any such theory. In the second place, there was no intimation at the time of the offer that there was anything in the contract to show that it was the intention of the parties that this illegal structure should be permanently maintained. In the third place, even if such an intention did so appear, it would be quite immaterial, for there is nothing in the statute appealed to which permits a railroad company and a municipality to agree that the former shall erect and maintain a nuisance in a public highway. In the face of the prior adjudication, the normal method to be adopted by this appellant company for legalizing its structure, so far as the plaintiff is concerned, is by taking advantage of its charter powers to condemn the right of the plaintiff which has been invaded by its illegal act.

One other matter has been called to our attention, namely, that the jury were permitted by the trial court in the making up of its verdict to assess punitive damages against the appellant. We are unable to perceive any theory upon which, under the facts before us, the appellant had subjected itself to a liability to have damages of this character assessed against it: but as this judicial action has not been made the basis of a ground of appeal, the judgment under review cannot be reversed for this error, notwithstanding its injurious character.

There will be an affirmance.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE. GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

90 N. J. L. Mausoleum Builders v. State Board of Taxes, &c.

**MAUSOLEUM BUILDERS OF NEW JERSEY, APPELLANT, v.
THE STATE BOARD OF TAXES AND ASSESSMENTS ET
AL., RESPONDENTS.**

Submitted December 11, 1916—Decided March 5, 1917.

1. A grant of exemption from taxation, even though made in respect to some particular property, is a personal privilege conferred upon the grantee, and the immunity thereby granted does not pass to a purchaser of the property, in the absence of an indication by the legislature, so clear and unmistakable as to leave no doubt of its purpose, that it shall so pass.
2. Neither the language nor the history of section 3, paragraph 6, of the General Tax act of 1903 (*Comp. Stat.*, p. 5083), which exempts "graveyards not exceeding ten acres of ground, cemeteries and buildings for cemetery use erected thereon," suggests that in passing it the legislature intended to confer immunity from taxation upon business corporations that should see fit to devote a part of their capital to the erection of mausoleums for purely commercial reasons and in the hope of making a profit out of the transaction.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 592.

For the appellant, *Michael Dunn*.

For the respondents, *Daniel L. Campbell*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. This is an appeal from a judgment of the Supreme Court in a *certiorari* proceeding brought to test the validity of a tax assessed by the borough of Totowa upon a building erected by the "Mausoleum Builders of New Jersey" for purposes of sepulture. The claim of the owners of the building, who were the prosecutors below and are the appellants here, was and is that this property is immune from taxation under section 3, paragraph 6, of the General Tax act of 1903 (*Comp. Stat.*, p. 5083), which exempts "graveyards not exceeding ten acres of ground, cemeteries and buildings for cemetery use erected thereon."

Mausoleum Builders v. State Board of Taxes, &c. 90 N. J. L.

The exemption provision appealed to first became a part of our General Tax act by the supplement of April 11th, 1866. *Pamph. L., p. 1078.* At that time lands used for the interment of the dead (with, perhaps, the exception of a few private lots where the owners of farms buried their own immediate families) were graveyards and cemeteries; the former being appendages to the churches in the state, used for the burial of the dead of the congregations, and in the ownership of the church organizations, the latter being owned by corporations created by the state either under special charter or general law, usually known as cemetery associations, and brought into existence for the primary purpose of acquiring lands to be devoted to the interment of the dead. The legislative scheme running through all of the enactments was the acquisition of a tract of land, the cutting it up into lots or plots, the selling of such lots or plots to individual purchasers for the purpose of burying the dead of such purchasers, and the perpetual maintenance of the tract in a proper and orderly condition. No change has been made in the text of the exemption enactment since its original passage, and the intention of the legislature with regard to its scope consequently remains unchanged. We are, therefore, to ascertain who were the beneficiaries of the immunity thus granted.

It is to be borne in mind that a grant of exemption from taxation, even though made in respect to some particular property, is a personal privilege conferred upon the grantee. *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 Id. 417; *Memphis, &c., R. R. Co. v. Commissioners*, 112 Id. 609; *Mercantile Bank v. Tennessee*, 161 Id. 161; *State Board of Assessors v. Morris and Essex Railroad Co.*, 49 N. J. L. 193. The immunity, therefore, provided by the supplement of 1866 was granted to the owners of churchyards and to the owners of cemeteries; that is to say, to church organizations which maintain graveyards as appurtenances to their respective churches, and to cemetery associations and the owners of burial lots within the cemetery tract.

90 N. J. L. Mausoleum Builders v. State Board of Taxes, &c.

Is the Mausoleum Builders of New Jersey one of the class of corporations within the spirit of the exemption provision? We think not; and for the purpose of making plain the reasons for our conclusion, a short statement of the facts set out in the return to the writ of *certiorari* is necessary.

The Laurel Grove Cemetery Company, a specially chartered corporation of this state, was created for the purpose of acquiring land in Passaic county to be devoted to cemetery uses. It exercised the power conferred upon it, and located a cemetery in what is now known as Totowa borough. The tract was laid out in lots and plots, with walks and avenues running through it. The Mausoleum Builders of New Jersey is an organization incorporated under the General Corporation act of this state. Some of the objects of its creation, as set forth in its certificate of incorporation, are the building of mausoleums; the manufacture of every kind of material, and dealing in the same; the acquisition, holding and disposing of stocks and bonds, and other personal property; the acquisition and holding, leasing and conveying, of real estate in New Jersey and elsewhere, and the purchasing, owning, chartering and operating of steamboats, tugs, barges and other boats. Some time prior to the assessment of the tax under review (but just when the return does not show), these two corporations entered into an agreement by the terms of which the cemetery company agreed to sell to the Mausoleum Builders a plot of ground within the limits of the cemetery, one hundred by one hundred and fifty feet, for the sum of \$10,000, for the purpose of enabling the purchaser to erect a mausoleum for the reception of the dead. The purchase-money was to be paid in installments, the first payment to be made when ground was broken for the erection of the building, the amount being \$1,000, and each succeeding month \$1,000 was to be paid until the whole sum was discharged. Pursuant to the provisions of this contract, the mausoleum company entered into possession of this plot and erected thereon the building which has been subjected to the tax.

Mausoleum Builders v. State Board of Taxes, &c. 90 N. J. L.

It is asserted that the legal title to the plot had not been transferred at the time the tax was laid upon this building. Assuming this to be the fact, it does not seem to us to be material in determining the validity of the tax, for the equitable, though not the legal, title to the tract is in the purchaser. After the legal title passes to the mausoleum company, the plot will cease to be anything more than a tract of land, not belonging to the cemetery company and not a part of the cemetery property, but merely adjacent thereto and surrounded thereby. It will hardly be disputed that it will then be as much subject to taxation as if the land had never formed a part of the cemetery tract. And if the cemetery association could not transfer to its vendee by the delivery of the conveyance immunity from taxation as to the property conveyed, it must at least be doubted whether it could do so by the subterfuge of holding the legal title in trust for its vendee.

It has already been pointed out that immunity from taxation, even though granted with respect to some particular property, is a personal privilege; and it is entirely settled that such immunity does not pass to a purchaser of the property in the absence of an indication by the legislature, so clear and unmistakable as to leave no doubt of its purpose, that it shall so pass. The authorities from the United States Supreme Court already cited, and our own decision in 49 N. J. L. 193, *supra*, fully recognize this principle. See, also, *Picard v. East Tennessee, &c., Railroad Co.*, 130 U. S. 637.

Neither the language of the tax enactment, nor its history, suggests that in passing it the legislature intended to confer immunity from taxation upon business corporations that should see fit to devote a part of their capital to the erection of mausoleums for purely commercial reasons, and in the hope of making a profit out of the transaction. Nor any purpose to authorize the corporations to whom such immunity is granted to transfer the exemption to corporations of the character just described.

90 N. J. L.Miller v. Hoboken.

But even if the soundness of the conclusion thus broadly stated is doubted, it will hardly be denied that the purpose of the legislature to grant such immunity to purely business corporations, or to permit its transfer to them, does not appear "by language so clear and unmistakable as to leave no doubt" of the existence of that purpose; and to doubt is to deny.

The judgment under review will be affirmed.

For affirmance—THE CHIEF JUSTICE, PARKER, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, JJ. 7.

For reversal—THE CHANCELLOR, SWAYZE, BERGEN, GARDNER, JJ. 4.

MAX MILLER, APPELLANT, v. MAYOR AND COUNCIL OF
CITY OF HOBOKEN ET AL., RESPONDENTS.

Argued November 27, 1916—Decided March 5, 1917.

The board of commissioners of a municipality, relying upon the statement of a bidder for a municipal contract that he had no connection with any other bidder, awarded him a contract for paving. It afterward appeared that he was superintendent of the plant of the only other bidder for the work. *Held*, that the award of the contract was made under a false representation, and will therefore be set aside.

On appeal from the Supreme Court.

The Supreme Court upon *certiorari* sustained the award of a municipal contract to William T. S. Crichfield in the following *per curiam*:

"We think the specifications furnished a common standard for bidding. We must assume that the power reserved for the engineer will be fairly exercised and we see no reason to think it is not reserved for the purpose of enabling the engineer to

save the city's money by avoiding such changes of grade as might lead to actions for damages.

"We think the contract contemplated is a single contract for repair work and is not to be regarded as so many separate and distinct contracts for each street.

"Assuming that the contention of the prosecutor is correct, and that Crichfield and the Uvalde company are identical in interest, we would not be justified in setting aside the contract. Upon that assumption; there was but one bidder, and the commissioners might have been justified in rejecting both bids; but they might also in the exercise of their discretion have been justified in awarding the contract. It cannot be said, as a matter of law, that it is improper to award a contract when there is only one bid.

"There must be judgment for the defendants."

The return to the writ supplemented by the evidence taken and the exhibits admitted under a rule in the *certiorari* proceeding established the following facts:

1. That the specifications under which bids were made required that "bids must be made out on blanks furnished at the city clerk's office."

2. That these blanks contained two declarations to be signed by each bidder in the words: "1. I do declare that I am the only person interested in this proposal, and that no other person than myself has any interest in this proposal, or in the contract proposed to be taken. 2. I further declare that this proposal is made without any connection with any other person or persons making proposals for the same work, and is, in all respects, fair and without collusion or fraud."

3. That these declarations were signed by William T. S. Crichfield in the bid proposed by him and by the Uvalde Asphalt Paving Company in the bid proposed by it for the same work.

4. That these were the only bids before the board of commissioners at the time they awarded the contract to Crichfield, whose bid was the lower of the two.

5. That at the time these two bids were signed, and at the time the contract was awarded, Crichfield was the general

90 N. J. L.

Miller v. Hoboken.

superintendent of the Uvalde Asphalt Paving Company under a written contract at an annual salary of \$10,000, besides all current expenses incident to his employment and his traveling expenses.

6. That by this contract Crichfield agreed "to give all of his time to the furtherance of the interests of the party of the first part," *i. e.*, the Uvalde paving company, and further that he "shall also in all respects endeavor to promote the success of the company's business."

7. A letter signed by R. S. Rokeby, president, the pertinent language of which is as follows: "My dear Sherman—Referring to your contract with the Uvalde company under date of the 2d of April, 1912. This is to confirm the verbal understanding you and I have. You are at liberty to bid on and undertake asphalt paving contracts in your name and in your own behalf on the following conditions," which are for the present purposes unimportant.

There was also a general denial by Crichfield of any secret understanding with the company of which he was superintendent as to their respective bids for the contract in question, or that the company had any interest in such contract.

For the appellant, *J. Emil Walscheid*.

For the respondents, *John J. Fallon and Collins & Corbin*.

The opinion of the court was delivered by

GARRISON, J. Doubtlessly, the commissioners, as suggested by the court below, would have been justified in rejecting both bids because of the intimate connection between the two bidders. The trouble is that they did not know of such connection when they awarded the contract, in reliance upon the declarations of both bidders that there was no connection between them.

I am not referring to the first declaration, which covered joint interest in the bid and the contract when awarded, but to the second declaration which dealt with the bidders themselves by declaring that there was no connection between

Miller v. Hoboken.90 N. J. L.

them, whereas the fact was that one was the general superintendent of the other. This anomalous situation is not explained away either upon the theory that the company did want the contract or that it did not want it; if the former, why did it encourage the competition of its own manager? If the latter, why did it bid at all?

The atmosphere of suspicion that could not but be created by the disclosure of the real facts, coupled with the disingenuous character of the declarations made by both bidders would have justified the rejection of both bids or at least the serious consideration by the commissioners of the propriety of taking such a course "in the best interests of the city." Of the benefit of this exercise of discretion by the commissioners the city was entirely deprived by the circumstance that the discrepancy between the declared facts and the actual facts was not known to the commissioners when they awarded the contract.

In addition to this detriment the award of the contract, under the circumstances, was for the same reason detrimental in so far as it necessarily rested upon false and misleading information both as to the fact of independent competition and as to the fallacious standard set up as to the lower of the two apparently competitive bids.

Apart from the public detriment presumably resulting from the false impressions under which the contract was awarded to Crichfield, such award should be set aside upon a ground directly affecting him. Crichfield knew what his connection with his company was; he knew also that he had declared that there was no connection between them; he knew, therefore, that in acting upon the faith of his declaration the commissioners would necessarily act under a false impression as to the actual facts. They did so act in awarding the contract to him. The doctrine applicable to such a situation is thus stated by this court in the case of *Lomerson v. Johnston*, 47 N. J. Eq. 312: "In order to establish a case of false representation it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false,

90 N. J. L. People's Bk. & Tr. Co. v. Passaic Co. Bd. of Tax.

it is, as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation."

Under this doctrine Crichfield cannot retain the contract awarded to him under a misapprehension of which he was cognizant without committing this court to an approval of an entirely indefensible practice.

The judgment by the Supreme Court is reversed and the award of the contract set aside.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

PEOPLE'S BANK AND TRUST COMPANY, APPELLANT, v.
PASSAIC COUNTY BOARD OF TAXATION, RESPONDENT.

Submitted July 10, 1916—Decided March 5, 1917.

1. A county board of taxation having made an assessment of the stock of a bank as required by the act for the taxation of bank stock (*Pamph. L. 1914, p. 141*), a claim for a deduction therefrom of the value of certain shares of stock in other banks taxable elsewhere was properly denied.
2. Double taxation is avoided under section 4 of the act not by excluding personal property of the bank that is taxable elsewhere from entering into the assessed value of its stock, but by providing that such assessment shall render such property immune from further taxation to the extent that its value has entered into such assessment.

On appeal from the Supreme Court.

This is an appeal from a judgment of the Supreme Court affirming an assessment of taxes for the year 1914, levied by the Passaic County Board of Taxation against the appellant

People's Bk. & Tr. Co. v. Passaic Co. Bd. of Tax. 90 N. J. L.

under the provisions of chapter 90, laws of 1914, regulating the taxation of bank stock.

The value of the stock of the bank, assessed according to the provisions of the act of 1914 was \$474,611.45, from which \$77,200 was deducted as the assessed value of real estate owned by the bank, leaving \$397,411.45 as the value of its stock, all of which was by its request assessed against the bank. A petition filed on December 17th, 1914, informed the board of taxation that the bank owned certain shares of stock of two banking institutions in Bergen county of the aggregate value of \$104,964.35, on which it had been assessed by the Bergen County Board of Taxation, the prayer of the petition being that the said sum of \$104,964.35 be deducted from the \$397,411.45, the assessed value of its own stock, and that it be taxed only upon the difference. The Passaic County Board of Taxation refused to make this deduction, which action was affirmed by the Supreme Court by the judgment now under review, the meritorious question being whether the deduction claimed by the appellant was authorized or required by the act for the taxation of bank stock. *Pamph. L. 1914, p. 141.*

For the appellant, *Humphreys & Sumner.*

For the respondent, *Fred W. Van Blarcom.*

The opinion of the court was delivered by

GARRISON, J. The deduction was not authorized by the statute: it is expressly forbidden by it. By section 2 of the act the only deduction authorized to be made is the assessed value of the real property of the bank. This express direction as to the deduction to be made excludes upon general principles the authority to make other deductions. The legislature, however, did not let the matter rest upon this general doctrine, but on the contrary concluded the section with the categorical statement, "No deduction or exemption shall be allowed or made from the value determined as herein provided."

90 N. J. L. People's Bk. & Tr. Co. v. Passaic Co. Bd. of Tax.

This injunction, which was addressed to and prescribed the duty of the taxing board, was followed in section 4 by an equally explicit statement addressed to the shareholders, whose stock was assessed under the act in these words: "The owners of such stock shall be entitled to no deduction from the taxable value of their shares * * * for any reason whatsoever." In the face of these unequivocal declarations, it is futile to argue that it was error for the board of taxation to refuse to allow a deduction which it was thus expressly commanded not to allow. No argument can make it error to obey a statute.

If the proceeding to test the board's denial of the deduction were by *mandamus*, the relator could not expect to get from the court a declaration that it was the clear legal duty of the board to violate an express provision of the statute.

The argument by which in this *certiorari* proceeding it is sought indirectly to put the board in the wrong, is based upon a misapprehension of the language of the fourth section of the Taxing act, viz.: "The said tax shall be in lieu of all other state, county or local taxation upon such shares, or upon any personal property held or owned * * * the value of which enters into the taxing value of such shares of stock." The appellant would construe this language as clothing the taxing board with the power and the duty to see that the value of personal property of the bank otherwise taxable did not enter into the taxing value of its shares assessed under the act, or, failing in that, to deduct the value of such property otherwise taxable from such taxing value when ascertained under the act.

Such a construction cannot be given to the language in question. First, because it conflicts with the express provisions already quoted; second, because it calls for data not in the possession of the board and not provided by the act in its third section or elsewhere; and third, because the language itself is not susceptible of having such a meaning placed upon it.

People's Bk. & Tr. Co. v. Passaic Co. Bd. of Tax. 90 N. J. L.

The meaning of the language in question is perfectly clear, and doubly so in view of the context, for it immediately follows the clause already quoted which declared that the shareholders were entitled to no deductions from the assessment made under the act. Having thus denied to the shareholders the right to any deduction from the assessment made under this act, the remainder of the section, which is the language under consideration, announces in favor of such shareholders a resulting exemption from further taxation as to any property value that has entered into the assessment made under the act. The object of this provision, as was pointed out in *Commercial Trust Company v. Board of Taxation*, 87 N. J. L. 179, was to avoid double taxation, but the means by which this is accomplished is not as the appellant contends, by deducting or excluding personal property of the bank that is taxable elsewhere from entering into the assessed value of its stock, but by providing that such assessment shall render the bank immune from further taxation on such personal property to the extent that its value has entered into such assessment.

The fact that the statute treats ownership by the bank as the equivalent of ownership by its shareholders, does not obscure its meaning or detract from its effect. The point that concerns the present controversy is that the language under consideration that is thus beneficial to the owners of the class of property affected, and that is binding upon taxing authorities seeking to impose further taxes thereon, is absolutely devoid of any effect as to the Passaic County Tax Board, whose assessment had produced the result thus announced. In fine, the clause in question does not purport to prescribe the conduct of such board in making the assessment required by the act, but simply declares what shall be the effect of such assessment when made. This is the chief, indeed the sole, aspect in which this clause is of any present interest, for if it imposed no duty upon the Passaic County Tax Board, it is for present purposes negligible; its practical workings or even its impracticability being no concern

90 N. J. L. People's Bk. & Tr. Co. v. Passaic Co. Bd. of Tax.

to the respondent, in the attitude in which it is now before this court.

The avoidance of double taxation, at which the provision in question is thus aimed, does not require or justify the arbitrary exemption from further taxation of the whole of the personal property with which the provision deals, but only its owner's immunity from the payment of any further tax upon the value of such property that has entered into the assessment under the statute. As to such value he has been duly taxed and hence as to it he shall not be further taxed, but as to the value of such property that is not so taxed, he is given no such immunity either by the spirit of section 4 or by its letter.

The fundamental proposition upon which this grant of immunity rests, and by which its extent is to be ascertained, is that every asset held by a bank enters into and is reflected in the true value of its stock. This proposition, as was pointed out in the case already cited, is essential to the constitutional taxation of property at its true value, and a doctrine that is thus essential to the validity of a taxing act must *a fortiori* be applicable to all of its provisions.

Starting with this imperative assumption, the value imparted by any particular asset of a bank to an assessment of its stock that reflects all of its assets is a mere matter of ratio, in which, three of the quantities being known, the fourth is ascertainable by a sum in simple proportion. The assets are known, the particular asset is known and can be subtracted therefrom, which gives the two sums of assets on which the ratio depends; the original assessment based on all the assets is also known. With these three known quantities the amount of an assessment into which the particular asset does not enter is readily determined, and the difference between this hypothetical assessment and the one into which such particular asset actually enters is the extent to which the value of the particular asset has entered into the taxing value ascertained under the act as to which value immunity from further taxation is granted. Properly construed, there-

Rounsaville v. Central R. R. of N. J.90 N. J. L.

fore, the language of section 4 is entirely without the force sought to be ascribed to it.

The conclusion reached is that the Passaic Board of Taxation, the respondent here, correctly refused to allow the deduction claimed by the appellant.

The judgment of the Supreme Court is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, WILLIAMS, GARDNER, JJ. 10.

For reversal—HEPPENHEIMER, J. 1.

GEORGE A. ROUNSAVILLE, RESPONDENT, v. THE CENTRAL
RAILROAD OF NEW JERSEY, APPELLANT.

Submitted December 6, 1915—Decided June 18, 1917.

The Federal Employers' Liability act, within its scope, viz., interstate commerce, deals with the same subject that is dealt with by the New Jersey Workmen's Compensation act under which the duty of an employer to make compensation to an employe for injuries arising out of the employment may exist independently of the negligence of the employer; whereas, the federal statute makes such duty to depend upon such negligence and excludes the existence of such duty in the absence of negligence. The federal act being thus comprehensive, both of those cases in which it excludes liability and of those in which it imposes it, ousts the Courts of Common Pleas of this state of jurisdiction under the New Jersey Workmen's Compensation act to award the compensation to be paid by a carrier to its employe for injuries received by the latter while both were engaged in interstate commerce.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 371.

90 N. J. L.Rounsaville v. Central R. R. of N. J.

For the appellant, *Charles E. Miller*.

For the respondent, *Elinor R. Gebhardt*.

The opinion of the court was delivered by

GARRISON, J. The respondent, a brakeman on the appellant's train under a contract made in this state, was injured in the course of his employment in Pennsylvania while appellant and he were engaged in interstate commerce. His petition to the Common Pleas of Warren county for compensation under the New Jersey Workmen's Compensation act was dismissed by Judge Roseberry upon the ground that the enactment by congress of the Federal Employers' Liability act prevented the application of state legislation to an injury received in the course of interstate commerce.

Upon appeal the Supreme Court held that this was not so and the judgment of the Pleas was reversed. *Rounsaville v. Central Railroad Co.*, 87 N. J. L. 371.

From the judgment of the Supreme Court this appeal was taken and argued before this court at the November term, 1915.

The decision of this appeal was held awaiting the decision by the Supreme Court of the United States of the case of *Erie Railroad Co. v. Winfield*, which involved precisely the questions.

That decision has now been promulgated in an opinion filed by Mr. Justice Van Devanter (not yet officially reported), in which it is held that "the Federal act (Employers' Liability act) proceeds upon the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such a duty in the absence of negligence, and that congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed."

A further question decided was whether or not under the New Jersey Workmen's Compensation act the interstate carrier might become bound contractually to make compensation to an employe, even though such injury came within the Fed-

Wilczynski v. Penna. R. R. Co.

90 N. J. L.

eral act as above construed. Upon this question Mr. Justice Van Devanter says: "It is beyond the power of any state to interfere with the operation of that act (Federal Employers' act), either by putting the carriers and their employes in interstate commerce to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."

This decision by the highest federal court as to the construction of a federal statute is binding upon this court and leads to the reversal of the judgment brought up by this appeal and the affirmance of the judgment of the Common Pleas of Warren county.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPPELHEIMER, WILLIAMS, TAYLOR, JJ. 11.

MARYAN WILCZYNSKI, ADMINISTRATRIX, RESPONDENT,
v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted March 27, 1916—Decided March 5, 1917.

1. Where the master provides his servants with a method of doing his work, which has a direct bearing upon the safety of those employed in such work, a duty arises on the part of the master to use reasonable care to provide a safe method, or at least to avoid a dangerous method if the exercise of reasonable care would produce that result.
2. The duty of a master to use reasonable care to provide a safe method for his employes to do his work, like the duty to use reasonable care to provide a safe place of work, is one that the master owes to his servants, and hence is one for the breach of which the master cannot escape liability by entrusting the performance of such duty to others, be they managers, agents, strangers, volunteers or fellow servants.

90 N. J. L.Wilczynski v. Penna. R. R. Co.

3. The obligation of a master to use reasonable care to provide a safe method of work for his employes cannot be avoided by ordering them to work at an employment in his interest but over which he exercises no control.
-

On appeal from the Supreme Court.

This is an action under the Federal Employers' Liability act to recover damages for the death of a servant of the appellant resulting from the negligence of that company while engaged in interstate commerce, in which it employed the plaintiff's intestate. The interstate commerce in which the appellant was engaged consisted in the carriage of steel girders from a point in the State of Delaware to a point in the State of New York. This is established by the appellant's answers to interrogatories as follows: "State where the said freight was received by the defendant." Answer, "From Edgemoor, Delaware." "State to where and to whom the said freight was consigned." Answer, "Post and McCord Company, New York City."

That the interstate character of the transaction continued to exist at the time of the accident was also established by the verdict of the jury, to whom the question was left as one essential to the plaintiff's right of recovery. At the time of this accident the deceased, whose name was Wilczynski, was on the deck of a barge to which the girders were being transferred from the appellant's car on its dock at Greenville, New Jersey, for transportation to New York City, the place of their consignment.

Wilczynski was regularly employed by the appellant as a laborer on this dock, and at the time of his injury had been ordered by the appellant to assist in the loading of the girders on the barge. The girders, which weighed five tons each, were hoisted from the car on the dock by means of a derrick on the boat, the arm of which was long enough to be swung over the car where a girder would be chained to its end, when the arm bearing the girder would be swung back over the deck of the boat and the girder lowered to its place.

The effect of the great weight of the girder at the extreme end of the arm of the derrick was to pull the boat sharply over to that side as long as the girder was suspended over the dock, and to cause the barge to right itself suddenly when the girder was swung over its deck. The rocking motion thus imparted to the boat had a tendency to dislodge the top girder of a pile that was unsupported by a neighboring pile of equal height, and the higher the pile the more likely would this be. The proper manner of piling the girders, as testified to by a witness for the defendant below, was to lay, first, the bottom tier, and then to add successively one girder only to each tier, thereby keeping the tiers of uniform height or so that at most no tier would top the others by more than one girder. The cause of the injury to Wilczynski, as the jury might find, was that the rocking of the boat dislodged the topmost of a pile of seven girders, causing it to fall on to the top girder of a much lower pile, thereby dislodging the girder thus struck and causing it to fall upon Wilczynski.

The defendant proved that the barge was owned by a lighterage company who employed the captain, mate and engineer, and that the servants of the railroad company, of whom Wilczynski was one, were ordered by the appellant to work on the boat under some arrangement between the railroad company and its consignee. The defendant also proved that the captain of the barge had entire charge of the loading of the girders on the boat, including the manner in which they should be placed and piled.

Exceptions were taken to the denial of motions for a nonsuit and for the direction of a verdict.

An exception was also taken to the following language of the charge: "The duty of this defendant company toward this intestate, if he was their servant at the time that he was doing the work there, was the duty to use reasonable care in and about the work of loading the barge or boat with the iron girders."

These exceptions are the basis of the grounds of appeal that have been argued.

90 N. J. L.Wilczynski v. Penna. R. R. Co.

For the appellant, *Vredenburg, Wall & Carey*.

For the respondent, *Charles M. Egan*.

The opinion of the court was delivered by

GARRISON, J. It was not error to deny the motions to take the case from the jury. There was ample testimony from which the jury could find that the dislodgment of the top girder of the highest pile by the rocking of the boat was due to the fact that the piles of girders had not been kept at a uniform height, as the testimony shows that they should have been, and as the fatal result in this case demonstrated. An accident from this cause would be due not to the work done or to be done by the servants of the defendant, but to the plan adopted for the proper distribution of the girders among the several tiers or piles, a matter over which such servants had no control, and in which they had no participation. Owing to the great weight of the girders, the tier or pile upon which any particular girder would be placed was the pile upon which it was mechanically lowered by the derrick operated under orders from the captain of the barge, who, in respect to the adoption of the method in which the girders should be piled up on the deck of the boat, occupied the dominant position of master. Where, however, the method provided for doing the work, or a part of it, has a direct bearing upon the safety of those employed in and about such work, a duty arises on the part of the master of such employes to use reasonable care to provide a safe method of doing the work, or at least to avoid a dangerous method if the exercise of reasonable care would produce that result. The state and federal decisions are collected in the *American Digest*, under key number Master and Servant 130.

This duty of the master, like the duty to use reasonable care to provide a safe place of work, with which it is closely assimilated in legal principle, is one that the master owes to his servants, and hence is one for the breach of which the master cannot escape liability by entrusting the perform-

ance of such duty to others, be they managers, agents, strangers, volunteers or fellow servants.

As we said in the case of *Laragay v. East Jersey Pipe Co.*, 77 N. J. L. 516: "When a master thus owes a duty to his servants it is immaterial what agency he may employ for its performance, it remains his duty, and he cannot escape liability for its negligent fulfillment by delegating its performance to one or more of the very class to whom such duty is owing. The test is not what agents did the master employ in the performance of a given duty, but whether the duty itself was one that he owed to his servants or one that they owed to him." Obviously, in the present case, the employes of the defendant owed no duty to it to provide a reasonably safe method of doing the work in which they were ordered to assist, and it is equally obvious that such a duty was owing by the defendant to its servants when it ordered them to engage in a work where their reasonable safety depended upon the method of doing it. Inasmuch as the defendant could not avoid this duty by delegating the performance of it to the captain of the barge, or by passively permitting it to be performed by him, it was immaterial upon the questions raised by the motions to nonsuit and to direct a verdict, what relation, if any, existed between the light-erage company and the Pennsylvania Railroad Company, or between the servants employed by the one and those employed by the other. For as the duty of the defendant to its servants could not be escaped by the delegation of its performance, neither could it be avoided by ordering them to work at an employment over which the defendant in fact exercised no control. The duty of the master followed the employment engaged in by the servant under the order of the master. The abandonment of a duty or the abdication of the power to perform it, does not discharge the duty or cancel the master's liability for its non-performance. The question remains, Was the duty in fact performed? and this, under the testimony in the present case, was a question for the jury. There was, therefore, no error in the denial of the motions to take the case from the jury.

90 N. J. L.

Wilczynski v. Penna. R. R. Co.

The exception to the charge which is the basis of the remaining ground of appeal presents the same legal question in a slightly different form.

The language of the charge covered any duty that was owed by the defendant to the plaintiff's intestate, and hence covered the one we have been considering, although no particular duty was specified. The ground of the exception, however, was not that the character of the duty was not specified, but that no duty of any character existed. When the exception was taken by counsel for the defendant, he was asked by the court, "Your point being just what?" To which inquiry the response was, "We claim that under the evidence we were under no duty at all to this plaintiff's intestate during the operation of the unloading and the transferring and stowing of the girders."

This exception presents, therefore, the same question that was presented by the motions to take the case from the jury, and hence, for the reasons given upon that branch of this appeal, the charge was not erroneous upon the ground pointed out by the exception or upon any other ground pointed out in the argument of this appeal.

Finding no error in any matter assigned as a ground of appeal, the judgment of the Supreme Court is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 12.

For reversal—THE CHIEF JUSTICE, PARKER, J. 2.

Ray Estate Corporation v. Steelman.

90 N. J. L.

RAY ESTATE CORPORATION, RESPONDENT, v. ANDREW J. STEELMAN, SUBSTITUTED ADMINISTRATOR, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

A decree of the Orphans' Court, barring creditors who have failed to present their claims within the time limited by a previous order of the court, bars a creditor from any right of action against the executor or administrator, founded upon a claim that might have been presented within the time so limited.

On appeal from the Supreme Court.

For the respondent, *Vredenburg, Wall & Carey*.

For the appellant, *Randolph Perkins*.

The opinion of the court was delivered by

SWAYZE, J. The plaintiff brought suit against the ancillary administrator of Alexander Miller to recover for rents, taxes and water rates due under a lease of land in New York City. The defendant, among other defences, set up that by an order made in the Hudson Orphans' Court, bearing date May 20th, 1913, the plaintiff was barred from any action therefor against the defendant. This defence was stricken out on motion, and was therefore not available to the defendant at the trial on the other issues. The Circuit judge evidently felt that there was merit in the defence, but was constrained by the order of the Supreme Court justice striking out the answer. Under rule 40 the order is appealable and the question is whether any cause of defence is disclosed. We think our review should not be controlled by niceties of pleading, but by the merits, if any are disclosed; and that defects in the answer may be supplied by amendment. The answer is defective in failing to aver that there was an order to limit creditors and the time within which claims were to be pre-

sented; and that the plaintiff had not brought in its claim within the time in said order directed.

The complaint claims for rent due May 1st, 1913, November 1st, 1913, and May 1st, 1914; and for taxes and water rates that became due prior to 1913, and in that year; part of which were paid by the plaintiff to the city of New York on October 2d, 1913, and part on May 6th, 1914. That the decree of the Orphans' Court bars creditors of their right of action against the executor or administrator on all claims that might have been presented within the time limited was held on conclusive reasoning by the Supreme Court in *Ryan v. Flanagan, Administratrix*, 38 N. J. L. 161, and treated as settled in the Court of Chancery. *Seymour v. Goodwin*, 68 N. J. Eq. 189. This disposes of the claim for rent due May 1st, 1913; as to that claim the plaintiff's action was barred and the defendant should have been allowed to plead the decree instead of having his answer wholly stricken out. The same course would clearly have been open as to the rent due November 1st, 1913, if the answer had set up what seems from the colloquy at the trial to have been the fact that the decree was not entered until February 20th, 1914. Notwithstanding this blunder, we think the defence was open as to the rent due November 1st, 1913, and May 1st, 1914. Both were liquidated demands which might be presented for allowance under section 69 of the Orphans' Court act. *Comp. Stat.*, p. 3834.

The question as to the taxes and water rates is more difficult. Most of these were in fact paid after February 20th, 1914. If the liability of the Miller estate did not accrue until the plaintiff paid the taxes and water rates to the municipality, so much as was paid after the decree barring creditors was not barred thereby since it could not be said that the plaintiff had neglected to bring in his debt, demand or claim, within the time limited; it is only creditors who so neglect that are barred. Such are the words of the statute, and such was the decision of the Supreme Court in *Wakeman v. Paulmier, Executor*, 39 N. J. L. 340. On the other hand, if the liability of the estate accrued immediately upon failure of the

Ray Estate Corporation v. Steelman.

90 N. J. L.

decendent to pay the taxes and water rates, there is no reason why the plaintiff's claim therefor should not be presented within the time limited. The demand, although for damages for breach of covenant, would be liquidated. The only averment before us is that Miller obligated himself to pay the taxes and water rates. Probably, he was in default if he failed to pay them when due. If so, the claim for taxes would be barred to that extent. But this applies only to taxes and water rates that accrued during his lifetime, *i. e.*, prior to May 6th, 1909. For defaults occurring after his death his personal representatives would be liable either *de bonis testatoris* or individually, and although they might be entitled to indemnity out of his estate, the claim therefor would not be a claim against the decedent barred by the decree of the Orphans' Court. This claim, apparently, cannot be made against the present defendant individually. His letters were not issued until June 19th, 1914, as averred in plaintiff's complaint and were ancillary only. The testator died in New York; the will was proved and administration had there, and the leased property was situate there. The question may, therefore, be presented, whether a mere ancillary administrator can be sued for a breach of covenant by the domiciliary executor that occurred after the decedent's death. This question, however, is not presented by the present record.

The error in striking out the second answer led to a trial on immaterial issues and thus affected the whole case. For this error the judgment must be reversed and the record remitted for a new trial.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

90 N. J. L.Stark v. Fagan.

NELSON STARK AND LAURA STARK, APPELLANTS, v.
MARK M. FAGAN, OVERSEER OF POOR OF JERSEY
CITY, RESPONDENT.

Argued November 27, 1916—Decided March 9, 1917.

Section 15 of the act of 1911 for the settlement and relief of the poor (*Pamph. L. 1911, p. 397*) prescribes two sets of conditions under which the court may have jurisdiction to compel certain relatives to maintain any poor person, namely: (1) upon complaint of the overseer of the poor where the overseer has made an order for relief and maintenance which the relatives have failed to perform, and (2) upon complaint by two freeholders, where the indigent relative is supported at public expense and the overseer neglects to make the order. Where no order has been made by the overseer and there is no proof that the indigent relative was supported at public expense, the action must fail, since the case is not within either class.

On error to the Supreme Court, whose opinion is reported in 89 N. J. L. 29.

For the appellants, *Ralph E. Lum.*

For the overseer of the poor, *John Bentley.*

The opinion of the court was delivered by

SWAYZE, J. Although counsel for the appellants made a very courageous argument to induce us to declare unconstitutional a statute which in substance antedates the constitution by nearly a century and has been on the statute book continuously since 1758 (2 *Nevill* 227), we think the only objection to the judgment worth considering is that the proceedings fail to show the jurisdictional facts required by the act. The statute now appears as section 15 of the act of 1911 for the settlement and relief of the poor. *Pamph. L., p. 397*. The procedure prescribed is different from that prescribed in the old act as amended in 1904. *Comp. Stat., p. 4023, § 30*. It requires that the father, grandfather, mother, grandmother, children and grandchildren of any poor person

Stark v. Fagan.

90 N. J. L.

not able to work, being of sufficient ability, relieve and maintain the poor person "in such manner as the overseer of the poor shall order and direct;" and that if any of the relatives named should fail to perform the order or direction of the overseer with regard to the support of such indigent relatives, or should such indigent relative be supported at public expense, and the overseer neglect to make such order or direction, it shall be lawful for the court to make the order upon complaint of the overseer or two freeholders resident in the municipality. Two cases are thus provided for—*first*, where the overseer has made an order for relief and maintenance which the relatives have failed to perform; *second*, where the indigent relative is supported at public expense and the overseer neglects to make the order. In the first case, it seems the court may act upon complaint of the overseer; in the second case, upon the complaint of two freeholders. This is the natural construction, since it can hardly be that an overseer who was willing to make the complaint to the court would fail to take the initial step of making the order for support; and it is equally improbable that the legislature meant that the complaint should be made to the court by two freeholders when the overseer was himself proceeding. It is, however, immaterial for the present case who is to make the complaint; the court has jurisdiction only in two cases, one where the overseer has made an order for support which the relatives have failed to perform, and the other where the indigent relative is supported at public expense. This case is not within either class. No order for support is shown or averred to have been made by the overseer, and there is no proof that the child who was the indigent relative was supported at public expense; for aught that appears the mother was performing her maternal duty. If she was, the grandparents could not be ordered to pay for the child's care and maintenance.

Let the judgment be reversed, with costs.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

90 N. J. L. Van Hoogenstyn v. D., L. & W. R. R. Co.

VINNIE VAN HOOGENSTYN, RESPONDENT, v. DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

1. The Court of Errors and Appeals cannot directly review the order of a single justice of the Supreme Court where he sits as such and not as the court itself.
2. An appeal under section 29 of the supplement of 1912 to the Practice act cannot be effective until final judgment.
3. The allowance by a justice of the Supreme Court of a *habeas corpus cum causa* to remove an action from the Circuit Court or Common Pleas, rests in his sound discretion and his order denying the writ is not appealable.

On appeal from an order made by the Chief Justice.

Application was made by the defendant to the Chief Justice, as one of the justices of the Supreme Court, for the allowance of a writ of *habeas corpus cum causa* to remove a suit from the Essex Common Pleas to the Supreme Court. No reason was assigned for the removal. The Chief Justice denied the application and the defendant appeals.

For the appellant, *Frederic B. Scott*.

For the respondent, *William L. Brunyate*.

The opinion of the court was delivered by

SWAYZE, J. This appeal presents several interesting legal novelties. (1) It purports to be an appeal from the Supreme Court, but is in fact an appeal from a refusal by the Chief Justice alone of an order which by statute is to be made by one of the justices of the Supreme Court, not by the court itself. (2) It is an attempt to have a case heard in this court before final judgment in any court and upon a mere refusal to issue a special form of process. (3) It is an attempt to review a matter which is within the discretion of

the justice of the Supreme Court, to whom application is made.

1. We hardly need cite authorities for the proposition that this court cannot directly review the order of a single justice of the Supreme Court, where he sits as such, and not as the court itself. The proper practice is pointed out in *Key v. Paul*, 61 N. J. L. 133. We cannot thus usurp the functions of the Supreme Court. *East Orange v. Hussey*, 70 *Id.* 244. Even the *Habeas Corpus* act, in providing for an appeal, is careful to provide that the proceedings shall be first removed by *certiorari* into the Supreme Court; only the final decision of that court can be removed into this. *Comp. Stat.*, pp. 2651-53. We do not mean to say that this section is applicable to the present case; we cite it to show the care with which the legislature, in a proceeding involving personal liberty, preserved the constitutional functions of the Supreme Court.

2. It is equally unnecessary to cite authorities for the proposition that an appeal cannot be effective until final judgment. The appeal in this case is taken under the supplement of 1912 to the Practice act. Section 25 permits an appeal where the appellant would formerly have been entitled to a writ of error. *Pamph. L.*, p. 382. That there could be no relief by writ of error until after final judgment is elementary learning. Courts of law do not permit the intolerable delay and expense that would arise if interlocutory appeals were permitted from every order that might be incidental to the progress of the cause; by its very terms the writ of error required a return only if judgment be given. The appellant relies upon *Defiance Fruit Co. v. Fox*, 76 N. J. L. 482; but that case came up only after final judgment. If it be said that the appellant would thus be deprived of any beneficial review, the answer is, first, that such deprivation does not necessarily follow, and second, that the order may be such that it ought not to be reviewed. The deprivation of a review does not necessarily follow since there is an appeal from the single justice to the court *in banc* in one of its parts under *Key v. Paul*; since, also, if the appellant was entitled

90 N. J. L. Van Hoogenstyn v. D., L. & W. R. R. Co.

to the order for a *habeas corpus cum causa* as a matter of right as he was at common law, he might have issued his writ and served it upon the Common Pleas and thus ousted that court of jurisdiction, so that any judgment rendered would be erroneous and subject to review. To this it may be answered that the statute requires that the writ be duly allowed by one of the justices. This is true, and is the second and conclusive answer.

3. The history of the legislation as to the writ of *habeas corpus cum causa* for the removal of causes into the Supreme Court, shows that this allowance was meant to be discretionary and was introduced for the correction of an abuse. At common law the writ issued of common right (3 Bl. Com. 130), and it was usual for a defendant to sue out the writ, keep it in his pocket without producing it, "till issue was joined, the jury sworn, and the plaintiff had given his evidence; by which means the plaintiff was not only put to considerable expense, but the defendant, knowing beforehand what proofs he could produce, had an opportunity of opposing them by false witnesses." 1 Tidd Pr. 405. An interesting history is given by Chief Justice Ewing in *Chandler v. Monmouth Bank*, 9 N. J. L. 101. Some of these abuses were corrected by the act of 1797, to which Chief Justice Ewing referred. *Pat. L.*, p. 258. The right of removal from the Common Pleas to the Supreme Court was limited to cases where debt, damages, matter or thing in controversy exceeded \$200; no writ of *habeas corpus* was to be received by the Common Pleas, nor any cause removed by such writ after issue joined upon matter of law or of fact. By section 86 of the Practice act of 1799 (*Pat. L.*, p. 364) the defendant on removing a cause by *habeas corpus* was required to enter into recognizance to the plaintiff in double the sum demanded for the payment of the condemnation money and costs in case judgment should pass against him. These provisions applied only to the removal from the Court of Common Pleas. In the act of 1838 to facilitate the administration of justice (*Pamph. L.*, p. 61), section 8 authorized the removal to the Supreme Court by *habeas corpus* of suits or

Van Hoogenstyn v. D., L' & W. R. R. Co. 90 N. J. L.

actions originally commenced in the Circuit Court. The conditions were the same as already existed in the case of removals from the Common Pleas, but there was the significant addition that the writ of *habeas corpus* should "be first duly allowed by one of the justices of the said Supreme Court." This provision was re-enacted in the revised statutes of 1846 (*Rev. Stat.*, p. 201, § 7), and the old provisions as to removal from the Common Pleas, with which the Circuit Court was now coupled in the act, were re-enacted in the Practice act. *Rev. Stat.*, p. 941, §§ 86 to 90, inclusive. So the law remained until the revision of 1874. *Rev. 1877*, p. 882, § 222. The two previously existing acts were then combined and the requirement that the writ should be first duly allowed by one of the justices of the Supreme Court became applicable to a removal from the Common Pleas as well as to a removal from the Circuit Court. So the law remains except for slight changes of wording intended to secure conciseness. *Comp. Stat.*, p. 4112, § 198. We think the legislature by the addition in 1846 of the requirement that the writ be allowed by a justice, meant to impose a condition of substantial importance similar to the previous limitation to the time before issue joined and the requirement of a recognizance, and that it did not mean merely to impose on the justice the burden of allowing as a mere form a writ that in substance was a writ of right. If it was substantial, the allowance involved some consideration by the justice of the cause of removal and some determination by him of the advisability of removal. No rules were prescribed by the legislature and it was therefore left to his sound discretion. This result, clear upon the history and language of the act, derives additional support from the fact that the writ of *habeas corpus cum causa* has fallen into disuse. Prior to 1839, cases are not uncommon in our reports. This is the first since that year to come before us. No doubt the writ may still be resorted to when for any reason the Circuit Court or Court of Common Pleas cannot be relied on to do justice, or a change of venue is proper, but it ought only to be allowed for good cause shown. No cause was shown or

even alleged in this case and the Chief Justice could not do otherwise than deny the writ.

The result, however, is not an affirmance of his order, but a dismissal of the appeal, for the reason that the order was not appealable. The respondent is entitled to costs.

**FERBER CONSTRUCTION COMPANY, RESPONDENT, v. THE
BOARD OF EDUCATION OF THE BOROUGH OF HAS-
BROUCK HEIGHTS, APPELLANT.**

Submitted December 11, 1916—Decided March 5, 1917.

1. Where damages may be sustained by the breach of a single stipulation, and are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum of money for such breach and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages.
2. Where in a suit for compensation under a building contract which provides for the completion of the building at a specified time, and that for every day's delay in completion the contractor shall pay the owner \$15 as liquidated damages, and the contract also provides that there shall be no extension of time unless (1) the delay is caused by the neglect or default of the owner, and unless (2) a written claim for extension is presented to the architect within forty-eight hours after the occurrence of the cause, and it appears on trial that performance was delayed, then the burden of proving that the delay was caused by the owner and that such claim for an extension was made, is upon the contractor.
3. The powers of an architect under whose direction a building is being erected, and the force and effect of any certificate he may give, are determined strictly by the contract.
4. Where in a suit for compensation under a building contract it appears that by the contract the architect had power by his certificate to determine conclusively that the contract had been completed, but had no power to determine how much the contractor upon completion was entitled to be paid, the mere written request of the architect that the owner pay a certain named sum to the contractor on the completion of certain substantial items therein specified, is no bar to the owner's counter-claim for damages for delay in completion.

Ferber Cons. Co. v. Hasbrouck Heights.90 N. J. L.

On appeal from the Bergen County Circuit Court.

For the appellant, *Luce & Kipp*.

For the respondent, *Hart & Vanderwart*.

The opinion of the court was delivered by

TRENCHARD, J. By written contract, dated May 27th, 1915, the plaintiff below undertook to construct for the defendant two school buildings for the contract price of \$32,653, which, by extra work agreed upon pursuant to contract provisions, became subsequently increased to \$34,751.

The plaintiff in its pleadings, admitted that, in cash and other agreed allowances, it had been paid the sum of \$29,530.36, as the work had progressed; and also that, of the balance of the increased contract price, namely, of the sum of \$5,220.64, the defendant was entitled to retain for one year the sum of \$1,629.65, under the terms of the contract, and so claimed the sum of \$3,590.99, with interest from November 29th, 1915, as the sum to which it was entitled.

The contract contained a provision that the defendant should be paid by the plaintiff \$15 for each day that the completion of the contract was delayed beyond October 1st, 1915; and the only defence which the defendant made on the trial was that the completion had been delayed fifty-nine days beyond October 1st, 1915, and that it was therefore entitled to recoup \$885.

The counter-claim thus insisted upon was adequately pleaded by the defendant. In its answer thereto, the plaintiff pleaded (a) that completion was not delayed, and (b) that any delay that there had been was the fault of the defendant and that the plaintiff had complied with the provisions of the contract relating to an extension of the time for completion in such case. To this latter defence, the defendant replied (1) by denying that any delay was caused by its fault, and (2) by specifying the particular conditions which the contract required the plaintiff to comply with, in order to be entitled to any extension of time, and denying that they had

been complied with, its allegation being (1) that the plaintiff had in no case presented any written notice of claim to the architect within forty-eight hours, and (2) that the architect has in no case granted any extension.

The facts necessary to be determined were, therefore (1), the date when the contract was completed, and (2) if that was after October 1st, 1915, whether or not the time for completion had been duly extended for the corresponding period.

At the trial the judge, over the defendant's objection, granted the plaintiff's request to direct a verdict for the full amount claimed by the plaintiff, and the defendant appeals from the consequent judgment.

We are of the opinion that the learned trial judge erred in directing a verdict for the full amount of the plaintiff's claim. We think that the evidence required at least that the defendant's counter-claim be submitted to the jury.

Where, as here, damages may be sustained by the breach of a single stipulation, and are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum of money as the measure of compensation for such breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. *Monmouth Park Association v. Wallis Iron Works*, 55 N. J. L. 132; *Van Buskirk v. Board of Education*, 78 Id. 650.

There was testimony at the trial tending to show that the contract was not completed until after October 1st, 1915.

The testimony of Mr. Ferber was, that on October 1st, 1915, there was work to the value of \$4,697 remaining to be done; that some of this may have been completed by October 7th; but that the hardware was not placed in the buildings until November 29th, 1915; and that even then there remained some painting and other work to be done. If this were true, it is quite clear that the defendant was entitled to some part of its counter-claim, unless it appeared that the time for completion had been extended.

Ferber Cons. Co. v. Hasbrouck Heights.90 N. J. L.

We think it did not conclusively appear that the time for completion had been extended.

Under the provisions of the contract, there could be no extension of time unless (a) completion was delayed by the act, neglect or default of the owner, or of the architect, or of some other contractor employed by the owner, or by damage caused by fire, or other casualty for which the contractor was not responsible, or by combined action of workmen in nowise caused by or resulting from default or collusion on the part of the contractor; and also unless (b) a written claim for an extension for any such cause was presented by the contractor to the architect within forty-eight hours after the occurrence of such cause; and also unless (c) the architect thereupon determined that an extension of time should be allowed and fixed the period thereof.

The plaintiff's contention is that the delay was caused by the neglect or default of the defendant. Now, it having appeared that there was a delay in performance, the burden of proving that the delayed performance was caused by the neglect or default of the defendant, and that a timely claim for an extension was made in conformity with the contract provisions, was upon the plaintiff. *Turner v. Wells*, 64 N. J. L. 269; *Feeney v. Bardsley*, 66 *Id.* 239.

We incline to think that there was no evidence tending to show that completion was delayed by any neglect or default of the owner or any agent of his. But if there was, it is perfectly certain that there was no evidence tending to show that any claim was made for an extension as required by the contract, and hence no extension was or could have been allowed.

We also think there was no conclusive evidence of waiver of the contract provisions in regard to timely performance, or extension of time, or of the defendant's right to compensation for delay.

The view of the trial judge was to the contrary.

He seems to have based his conclusion upon a written request addressed by the architect to the defendant on November 29th, 1915, that defendant pay to the plaintiff \$5,220.55, when certain work therein mentioned had been completed by the plaintiff.

90 N. J. L.

Ferber Cons. Co. v. Hasbrouck Heights.

We pause to remark that this letter was evidently written under a misapprehension, because it is conceded that not even upon full completion would such amount be due.

But, apart from that, we think the view of the trial judge erroneous. His holding necessarily asserted that this document conclusively established either (1) that the contract had been performed, or (2) that the time for performance had been legally extended for a period equivalent to any delay.

We think it did not so establish either proposition.

The powers of the architect under whose direction a building is erected, and the force and effect of any certificate he may give, are determined strictly by the contract. *Newark v. New Jersey Asphalt Co.*, 68 N. J. L. 458; *Welch v. Hub-schmitt*, 61 Id. 57; *Gerisch v. Herold*, 82 Id. 605; *Mackin-son v. Conlon*, 55 Id. 564.

A perusal of the provisions of the contract in question discloses that thereby the architect had power by his certificate to determine conclusively that the contract had been completed. But that he did not do. He did not certify that it had been completed either on October 1st, 1915, the date required by the contract, or on November 29th, 1915, the date of his certificate, or, in fact, that it had been completed on any other date. On the contrary, he stated therein that it had not been finished in several substantial particulars. Under the contract he had no authority to determine how much the contractor, upon completion, was entitled to be paid. As a consequence, it follows that the so-called certificate was no bar to the defendant's counter-claim for damages for delay in the completion of the buildings, and that the direction of a verdict for the full amount of the plaintiff's claim was therefore improper.

The judgment of the court below will be reversed and a *venire de novo* awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

PHILIP D. HEINZ, RESPONDENT, v. THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

1. Where a defendant in an action in the Supreme Court, tried at Circuit, elects to apply for and obtain a rule to show cause why a new trial shall not be granted, and no points are expressly reserved in the rule, he is barred from taking or prosecuting an appeal except upon matters of law arising upon the face of the record.
2. On defendant's rule to show cause why a verdict in the Supreme Court should not be set aside as excessive and a new trial granted, that court has power, in the exercise of its discretion, to give the plaintiff the option of accepting a reduced verdict, or being put to a new trial. This power exists not only in actions based upon contracts, but also in actions for unliquidated damages for torts, and when, in such a case, the plaintiff has filed a *remittitur* of so much as the court deemed excessive, and judgment has been entered for the reduced verdict, this court will not review the action taken by the Supreme Court on the appeal of the party in whose favor the reduction was made.
3. Although the appellate court has the power to dismiss an appeal which is manifestly and palpably frivolous and without merit, it will not, as a rule, dismiss on such ground, in the absence of a motion for that purpose, but will affirm the judgment below.

On appeal from the Supreme Court.

For the appellant, *Frederic B. Scott*.

For the respondent, *William H. Morrow*.

The opinion of the court was delivered by

TRENCHARD, J. The plaintiff below had the verdict of a jury at the Sussex Circuit in an action in the Supreme Court for damages to his person and property in a railroad crossing accident.

The defendant obtained a rule to show cause why a new trial should not be granted. No points were reserved in the rule.

From the judgment record it appears that the Supreme Court, after a hearing, determined that the verdict of \$11,300 was excessive, and ordered that it should be set aside and a new trial be had unless the plaintiff remitted the sum of \$1,355 from the verdict.

Thereupon the plaintiff remitted such sum of \$1,355 and accepted the sum of \$9,945 in lieu of such verdict, and judgment was entered accordingly.

The defendant appeals from that judgment.

We are of the opinion that the appeal is so clearly without merit as to justify us in characterizing it as frivolous.

The legislature has declared that the "granting to a party a rule to show cause why a new trial shall not be granted, shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule." *Pamph. L. 1912, p. 399, rule 83.*

Since the defendant elected to apply for and obtain the rule, and since no points were expressly reserved in the rule, the defendant is barred from taking or prosecuting an appeal, except upon matters of law arising upon the face of the record.

The defendant, however, contends that in an action such as this, sounding in tort for unliquidated damages, the Supreme Court was without power to deny a new trial upon condition that the plaintiff should remit a part of the verdict, and assigns such action as a ground of appeal.

It is quite true, as pointed out in *Noxon v. Remington*, 61 *Atl. Rep. (Conn.)* 963, that upon this point the practice is not uniform in the different jurisdictions.

In England the power is denied in *Watt v. Watt*, *L. R. App. Cas.* (1905) 115, overruling *Belt v. Lawes*, 12 *Q. B. D.* (1884) 356.

On the other hand, the practice of requiring the plaintiff in such cases to submit to a new trial unless he remits a part of the verdict, the amount of which is clearly excessive, is sanctioned by the Supreme Court of the United States and by many of our state courts. *Arkansas Cattle Co. v. Mann*, 130 *U. S.* 69; *Chicago City R. Co. v. Gemmill*, 209 *Ill.*

638; *Landry v. New Orleans Shipwright Co.*, 112 La. 515; *Adcock v. Oregon R. & N. Co. (Or.)*, 77 Pac. 78; *Bailey v. Cascade Timber Co.*, 35 Wash. 295; *Ingraham v. Weidler*, 139 Cal. 588; *Noxon v. Remington*, *supra*.

Many cases from different states are cited in 18 *Enc. of P. & P.* 125-127, in support of the statement in the text that the power of a court to permit or require the entry of a *remittitur* in actions for unliquidated damages for torts, when the damages awarded by the jury are excessive, exists by the great weight of authority.

In this state the Supreme Court undoubtedly has power, on defendant's rule to show cause why a verdict in that court should not be set aside and a new trial granted, to give the plaintiff the option of accepting a reduced verdict, or being put to a new trial. That power has been frequently exercised, not only in cases based upon contracts (*New Jersey Flax Cotton Wool Co. v. Mills*, 26 N. J. L. 60; *Budd v. Hiler*, 27 *Id.* 43; *Rafferty v. Bank of Jersey City*, 33 *Id.* 368, and *Newell v. Clark*, 46 *Id.* 363), but also in actions for unliquidated damages for torts. *Jackson v. Traction Co.*, 59 *Id.* 25; *May v. West Jersey, &c., R. R. Co.*, 62 *Id.* 67; *Rafferty v. Erie R. R. Co.*, 66 *Id.* 444, and *Baldwin v. Thompson*, 70 *Id.* 447.

So well settled in this state is the power of the trial court to put the plaintiff to an election of accepting a reduced verdict or a new trial, in order to do substantial justice and save the expense of a new trial, that hitherto it seems not to have been seriously questioned.

Of course the court is within the limits of its authority when it sets aside a verdict of a jury and grants a new trial where the damages are palpably excessive, and no appeal lies therefrom.

So, too, of course, the refusal to grant a new trial is within the power of the court, and is no ground for appeal. *De Mateo v. Perano*, 80 N. J. L. 437.

In considering whether a new trial shall be granted upon the ground that the verdict is excessive, the trial court neces-

90 N. J. L.

Heinz v. D., L. & W. R. R. Co.

sarily determines, in its own mind, whether a verdict for a given amount would be excessive. The authority to determine whether the damages are excessive implies authority to determine when they are not of that character. To require a plaintiff to submit to a new trial, unless by remitting a part of the verdict he removes the objection that the damages are excessive, certainly does not deprive the defendant of any right or give it any cause for complaint. It is in no sense an impairment of the constitutional right of trial by jury. *Arkansas Cattle Co. v. Mann, supra; Noxon v. Remington, supra.* Since the reduced sum required to be paid by the judgment, after the *remittitur* has been filed, is a part of the damages assessed by the jury, the defendant cannot be heard to say that such reduced damages were not assessed by the jury.

But the defendant contends that the plaintiff could not have been required to remit a part of his verdict except upon the theory that the jury in finding their verdict were governed by passion or prejudice, and that, therefore, it should have been set aside as unfit for the basis of a judgment.

Undoubtedly if the Supreme Court had entertained such view of the motives and conduct of the jury, it would have set aside the verdict and submitted the case to another jury. But with that matter we are not concerned on this appeal. Our function is merely to ascertain whether there is any error apparent upon the face of the record which is subject to review on this appeal. We think there was none.

As we have pointed out, the refusal of a new trial in the Supreme Court is not subject to review by this court. That is a matter resting in the discretion of the trial court. *De Mateo v. Perano, supra.* And it is equally beyond our authority to review, upon the appeal of the party against whom a verdict is rendered, an order discharging a rule to show cause why a new trial should not be granted, after the plaintiff, with leave of the court, has remitted a part of the verdict. Whether a verdict should be entirely set aside as

Heinz v. D., L. & W. R. R. Co.

90 N. J. L.

excessive, or as the result of passion or prejudice, or whether it should stand after being reduced to such an amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the trial court and cannot be reviewed on appeal at the instance of the party in whose favor the reduction was made. *De Mateo v. Perano, supra*; *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647; *Arkansas Cattle Co. v. Mann, supra*. If the Supreme Court had discharged the rule and entered judgment for the full amount of the verdict, the defendant on appeal to this court could not have questioned the judgment as excessive. There being no points reserved in the rule, we could only, in that case, have considered matters of law arising upon the face of the record. And we can do no more when the defendant brings to us a record, showing that the court below has, in the exercise of its discretion, compelled the plaintiff, as a condition to its refusing a new trial, to remit a part of the verdict.

No doubt this appeal, being manifestly and palpably frivolous and without merit, was subject to dismissal. But no such motion was made, the plaintiff below apparently preferring an affirmance of his judgment. In such case the latter course will be pursued.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L.Bouquet v. Hackensack Water Co.

MAXIME BOUQUET, APPELLANT, v. HACKENSACK WATER
COMPANY, RESPONDENT.

Argued March 7, 1917—Decided June 18, 1917. .

1. In order that an individual may maintain an action for a public nuisance, he must prove that he thereby suffers a particular, direct and substantial injury. Citing 19 E. R. C. 263.
2. A riparian owner on a navigable stream suffers no peculiar injury as such because the stream has been made less pleasant for boating, fishing, and bathing. The injury to him is the same as that to any other member of the public, and for the reason that his right *qua* riparian owner is that of access, and not a special right to use the stream in any different manner than others may use it.
3. A judgment for appellant for nominal damages, although erroneous, will not be reversed if he was not entitled to any damages.

On appeal from the Supreme Court.For the appellant, *Arthur T. Dear*.For the respondent, *Edwin F. Smith*.

The opinion of the court was delivered by

PARKER, J. Appellant, plaintiff below, claims to be legally aggrieved by the action of the trial judge in directing a verdict in his favor for nominal damages of six cents.

His case, as finally submitted, was that he owned land on the easterly side of the Hackensack river, a navigable stream, on which land was a dwelling-house occupied by him and used for the keeping of summer boarders; and that prior to the summer of 1914 he had many boarders and did a profitable business, but in that year and thereafter the water in the river in front of his place was fouled by the act of the defendant, so that it was not so pleasant as it had been to look at or so available for fishing, boating and swimming, and that in consequence the boarders, who had been attracted by the view and the boating, fishing and swimming, were caused to re-

Bouquet v. Hackensack Water Co.

90 N. J. L.

main away, whereby plaintiff suffered material loss. There was some claim of an odor from the water, but this was disregarded at the trial and is not now urged. The view taken by the trial court was that on the assumption that plaintiff's title extended to high-water mark in the river, the rights, if they existed, of swimming in the river, boating on it, and looking at the view, were not special rights of plaintiff *qua* riparian owner, or of his guests claiming under his license, but were rights of a purely public character, and that in their infringement plaintiff suffered simply as a member of the public and could not claim special damage in a private action.

Our examination of the case satisfies us that plaintiff was in no way legally injured by this ruling. It is not claimed that he was entitled to recover in this suit as a member of the public, for the deprivation of benefits because his guests found the river no longer pleasant for boating, fishing or swimming. The claim must rest, if at all, on the injury resulting to plaintiff as an abutting owner. But the right of an owner of the *ripa* of navigable water is that of access; and if that be unlawfully interfered with he may maintain a special action. *Stevens v. Paterson and Newark Railroad Co.*, 34 N. J. L. 532, 553. Apart from this, he has no peculiar right to the use of the water or of the shore. *Ibid.* 542, 543; *Whitmore v. Brown (Me.)*, 65 Atl. Rep. 516, 521. Plaintiff, as owner of land on or near the river, may have more occasion to make use of the public rights of boating and (if there be such rights) of fishing and bathing, but those rights remain public and not private.

The rule, as we understand it, is this: "That in order that an individual may maintain an action for a public nuisance, he must prove that he thereby suffers a particular, direct and substantial injury." *Benjamin v. Storr*, 19 E. R. C. 263. The same rule, in different phraseology, will be found in *Mehrhof v. Delaware, Lackawanna and Western Railroad Co.*, 51 N. J. L. 56 (at p. 57). It may be conceded that plaintiff's injury was substantial; there is more doubt whether it was direct, but that may also be conceded for the sake of argu-

90 N. J. L.

Bouquet v. Hackensack Water Co.

ment; it was not, however, particular, as we have already seen. The result is that the trial judge would have been justified in awarding a nonsuit or in directing a verdict for the defendant.

All this has been predicated on the assumption that plaintiff exhibited a title running down to high-water mark. The case does not, in our judgment, show that he gave proof of any such title. His deed, offered in evidence, called for certain lots on a designated map (which map was not put in evidence), and the only mention of the river was contained in a clause in the deed reading as follows:

"Together with all right, title and interest of the party of the first part in and to the land lying between high-water mark of the Hackensack river and the middle of Riverside avenue, as shown on said map, lying directly opposite or in front of such of the property above described as has a frontage on said Riverside avenue."

There was no proof of what that right, title and interest was, or that there was any at all. It affirmatively appeared that there was a strip several feet wide between Riverside avenue and the river. If plaintiff did not own this strip, his right even to access to the river was no better than that of an owner of land a long distance away, or one not an owner at all. But as plaintiff might peradventure have shown some title as a riparian owner, we have preferred to treat the case as if such were the fact.

Inasmuch as plaintiff was not harmed by the direction in his favor of a nominal verdict, the judgment will be affirmed. *Sypherd v. Myers*, 80 N. J. L. 321; *Butterhof v. Butterhof*, 84 *Id.* 285.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 12.

For reversal—WHITE, TAYLOR, JJ. 2.

Jerolaman v. Belleville.90 N. J. L.

THEODORE JEROLAMAN, RESPONDENT, v. THE TOWN OF
BELLEVILLE, APPELLANT.

Submitted December 11, 1916—Decided June 18, 1917.

1. A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drains, it would not go.
2. Evidence legal for some purpose cannot be excluded because a jury may erroneously use it for another purpose. The opposite party's protection against this is to ask for cautionary instruction.

On appeal from the Essex Circuit Court.For the appellant, *Harold A. Miller*.For the respondent, *Pitney, Hardin & Skinner*.

The opinion of the court was delivered by

PARKER, J. The suit was for overflowing plaintiff's lands by water, and the complaint, in two counts, alleged two different dates when such overflow occurred. The jury found for plaintiff in the sums of \$179.18 on the first count, and \$2,935.66 on the second count.

Plaintiff was the owner and occupier of a coal and lumber yard on the northwest corner of Cortlandt and Jerolaman streets in Belleville. Jerolaman street runs substantially east and west. One block west of Cortlandt street and running parallel with it is the Paterson and Newark branch of the Erie railroad. A block further west, up a sharp grade, is Washington avenue, an important highway between Newark and Paterson. Next west of Washington avenue, and still further up the hill, is Linden avenue. North of Jerolaman street and east of Linden avenue was a spring, whose overflow ran generally slightly south of east, always to the north of Jerolaman street, passing under Washington avenue down the hill, under the railroad through a culvert, and

90 N. J. L.

Jerolaman v. Belleville.

across plaintiff's lands to the corner of Jerolaman and Cortlandt streets and so to the Passaic river. Previous to the occurrences giving rise to the suit, the town had adopted a general plan of regrading, which involved, among other things, the elimination of a "hump" in Jerolaman street above Washington avenue, which had retarded the flow of water down the hill; and these changes, as claimed by plaintiff, led to the flooding of Jerolaman street in heavy rains, which resulted in cutting gullies and carrying away of soil, so that the town undertook to prevent this by banking the east side of Washington avenue, which prevented the water from running down Jerolaman street, and, as plaintiff claimed, turned it in large measure into the natural water course already described. The case presented under the first count was that in the storm conditions of November 11th, 1911, this artificial diversion caused an overflow of plaintiff's land whereby he was damaged.

The second count, as amended, rested on the same acts of defendant in diverting the water, and in addition charged that early in 1912 the town connected the natural water course with a covered drain just east of plaintiff's premises, and put catch bars across the opening, so that in March, 1912, during storm conditions, the excessive volume of diverted water flooded plaintiff's premises as before and in addition the opening of the covered drain became blocked by debris caught by the bars and the water backed up on plaintiff's premises.

1. There was a motion to nonsuit on each count, and it is now urged that there should at least have been a nonsuit as to the first count. For this, the case of *Miller v. Morristown*, 47 N. J. Eq. 62, affirmed in this court in 48 *Id.* 645, is relied on as the leading authority. The argument proceeds on the assumption that plaintiff's evidence showed nothing more than a regrading of streets and diversion of water consequent thereon. If this were true, defendant's point would be well taken under the first branch of the *Miller* case; but the evidence tends to show in addition, and the jury evidently found, that water flowing down Jerola-

man street had been intentionally diverted therefrom by special provision for that purpose and thrown on plaintiff's land. This was a very different thing from mere regrading, and brought the case under the second branch of the Miller case where it was held that such conduct is an actionable injury. The law was stated by the court in the precise language of the syllabus to the case cited, on both branches, and the jury was justified in finding that the conditions of the second proposition were met. The same rule was laid down by this court in the later case of *Kehoe v. Rutherford*, 74 N. J. L. 659, where the conditions closely approximated those in the case at bar. If the plaintiff's evidence were believed, the defendant for its own convenience diverted the water naturally flowing down Jerolaman street and turned it over the plaintiff's land. This it had no right to do without making proper compensation.

2. The same considerations dispose of the point that there should have been a direction of verdict for the defendant. There was a fair conflict of evidence, and a direction would have been improper.

3. Error is further charged in that the court permitted evidence of changes made by defendant in the drainage system after the injuries complained of.

Ordinarily it may be conceded such evidence is irrelevant and injurious, in tending to operate as an admission of guilt. In the present case, however, it came in on the cross-examination of defendant's engineer, who had denied in his testimony that the flood water had run down the street in any such quantity as to do material damage to the roadway and lead defendant to provide for it in other ways. This was a material point in plaintiff's case, and to meet it he was entitled to bring out that defendant had taken care of this storm water by a special sewer; the inference, of course, being that unless there were a material amount of storm water, the culvert would not have been built, and its building was evidential of the incorrectness of the witness' statement. In this aspect it was competent; its incidental harmfulness as tending to show an admission of liability could and should

90 N. J. L.

Jerolaman v. Belleville.

have been met by a proper request to limit its application in the charge. *Trenton Pass. Railway Co. v. Cooper*, 60 N. J. L. 219, 223; *Perry v. Levy*, 87 Id. 670.

4. Finally, it is claimed that the court erred in charging the jury as follows in response to plaintiff's request:

"If the jury find that, at the time complained of, water which in its natural course according to the grade of streets and levels of adjacent property, would not have reached plaintiff's land, was artificially collected and diverted by the town to the plaintiff's land, to his damage, it will not excuse the town that the water years before, by another route, had reached the watercourse that ran through plaintiff's land. In other words, if on the 11th of November, 1911, and the 12th and 13th of March, 1912, water which would not have come to the plaintiff's land in any way was thrown upon it, the fact that at some prior time it had come upon the plaintiff's land by some other course is past history which does not concern the court and jury."

The objection to this instruction, stated in the language of appellant's brief, is this: That the jury were told "that they were not concerned with the question whether the same volume of water, from the same sources, prior to the acts of defendant would or would not have reached plaintiff's land by the natural watercourses of the surrounding country."

If by "acts of defendant" counsel means the general system of regrading, rather than the particular act of diversion at the crossing of Washington avenue, the charge was correct. If, as was held in *Miller v. Morristown*, the town might lawfully adopt a new set of grades causing incidental changes in drainage, it is that system, and not the natural drainage of an uninhabited country to which owners are to conform and which they are entitled to assume will be maintained. If by "acts of defendant" the particular diversion is meant, we answer that a reading of the instruction will demonstrate that no such interpretation as that indicated by appellant can reasonably be placed upon it; for the comparison is between the "natural course, according to the grade

Kratz v. D., L. & W. R. R. Co.90 N. J. L.

of streets and levels of adjacent property," and the "artificial collection and diversion to plaintiff's land."

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

GUSTAVE KRATZ, RESPONDENT, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917

The provisions of both chapter 35 and chapter 96 of the laws of 1909 are applicable to cases at railroad grade crossings which are provided with safety gates, or other devices for the warning of travelers.

On appeal from the Morris Circuit Court.

For the appellant, *Frederic B. Scott*.

For the respondent, *James H. Bolitho*.

The opinion of the court was delivered by

PARKER, J. This case arose out of a railroad crossing accident, and on the trial the plaintiff had a verdict and judgment. The material circumstances of the accident were that the plaintiff was crossing the railroad on foot within the lines of a public highway, as he testified, and was struck by a train just as he was leaving the crossing. The defendant company had installed safety gates which, as the plaintiff claimed,

and as the jury were entitled to find, were up at the time he attempted to cross.

The sole ground of appeal presents a somewhat lengthy extract from the charge of the trial court which need not be quoted at length in view of the character of the exception taken by counsel at the trial, and which is as follows: "I desire to note an exception to your honor's charging that chapter 96, laws of 1909, applies to this case; my thought being that if any statute applies it is chapter 35, laws of 1909, which, to my mind, is essentially different and more beneficial to the defendant." The only inference to which this language of counsel is susceptible is that counsel wished to point out to the court his view that it was erroneous to instruct the jury that chapter 96 was applicable, although chapter 35 might be, and probably was, applicable.

The entire argument of appellant rests upon the proposition just quoted, and the sole ground now urged in support of the proposition that chapter 96 was inapplicable, is contained in the first paragraph of the argument in brief of counsel, viz.: "There was no evidence in the entire case that the appellant was either operating under or had complied with chapter 96 of the laws of 1909, with respect to posting a notice at such crossing, specifying during what hours the gates would be operated, and, in view of that fact, it is contended that the act in question was not the act applicable to the situation shown by the instant case."

It appeared in the testimony that there were safety gates which at the time of the accident were under the control of a towerman employed by the defendant who testified that he was actually operating them at that time as occasion required. There does not seem to be anything in the testimony indicating whether the company had installed any such sign or notice as described in the statute. If there had been such a notice, and the accident had occurred within the hours of non-operation specified therein, it is safe to say that the defendant would have proved that fact; on the contrary, the claim seems to be that because there was no evidence of the existence of such notice, the case should be treated as though there were

in fact no such notice, and from these premises it is argued that the statute, chapter 96 of the laws of 1909, does not apply. The contrary, however, was decided in the recent case of *Brown v. Erie Railroad Co.*, 87 N. J. L. 487 (at p. 495), in which case it was held that not only chapter 35, but also chapter 96, are applicable to such a situation.

In view of this decision the trial court was plainly right in instructing the jury that chapter 96 applied, and, as the remainder of counsel's brief (there was no oral argument) is based wholly upon the alleged error of this instruction, it becomes unnecessary to deal with it in detail. The judgment of the Circuit Court is therefore affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN. MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

ARVINE H. PHILLIPS, PROSECUTOR (MAX AND SARAH RAMBERGER SEASHORE HOME, APPELLANT), v. BOROUGHO OF LONGPORT, RESPONDENT.

Argued November 24, 1916—Decided March 5, 1917.

1. The act of 1881 (*Pamph L.*, p. 194; *Comp. Stat.*, p. 5171), providing for reassessment under direction of the Supreme Court when the original assessment is set aside on *certiorari* for defects in the proceedings, is applicable in all cases where a valid assessment could have been made at the time it was attempted, or could be made at the time of pronouncing judgment on a *certiorari* of the defective assessment.
2. On an appeal corresponding to writ of error at common law, every intendment is in favor of the correctness of the judgment below, and doubt will not lead to a reversal.
3. On appeal corresponding to a writ of error, the appellate court cannot properly deal with any other state of the case except that considered by the court below.

90 N. J. L.Phillips v. Longport.

On appeal from the Supreme Court.

For the appellant, *Clarence L. Cole*.

For the respondent, *Harry Wootton*.

The opinion of the court was delivered by

PARKER, J. The appeal involves an assessment on the real estate of appellant Seashore Home for benefits resulting from the construction of jetties built to protect the ocean front. The original assessment was set aside at the suit of the prosecutor, Phillips, who is not a party to the present appeal. A reassessment was then made and on *certiorari* was likewise set aside. Thereupon the Supreme Court, acting no doubt by virtue of the act of 1881 (*Pamph. L.*, p. 194; *Comp. Stat.*, p. 5171, § 191), appointed its own commissioners to make a third assessment; and on the coming in of their report, the present appellant objected to its confirmation, on the grounds, as now alleged—*first*, that the court was without power to appoint its commissioners to reassess in such a case; and *secondly* (as claimed), that the new assessment, professedly reached by adopting percentages of valuation of the respective properties by a uniform rule, had charged such percentage as to appellants, not only on the value of their land, but also on that of their new building erected after the improvement was made. The court overruled all objections and confirmed the report, and its action in so doing is challenged by this appeal. A review of such action by appeal corresponding to a writ of error is obviously proper (*Eames v. Stiles*, 31 N. J. L. 490), and has the sanction of precedent. *Moran v. Jersey City*, 58 *Id.* 653.

The denial by appellant of the power of the Supreme Court to appoint its own commissioners to reassess is grounded, if we understand the argument of counsel, on the provision of the Borough act requiring that the commissioners of assessment in a borough shall be freeholders and residents in that borough, but at the same time providing that

Phillips v. Longport.

90 N. J. L.

they shall not be interested in the matter of the assessment. *Comp. Stat.*, p. 259, § 52; *Pamph. L.* 1897, p. 310; *Pamph. L.* 1900, p. 402. Based on the assumption that the original assessment included all the land in the borough as to some extent benefited by protection from the sea, the argument now is, that as every freeholder and resident was (as claimed) interested in the assessment, no commissioners could be appointed who would be qualified under the statute, so that no lawful assessment could be made by the borough, and the act of 1881 had no basis upon which to operate.

Without conceding the inapplicability of the act of 1881 in such a supposed case, it is enough to say that that case is not now shown to exist. The original assessment is not laid before us; and it does not otherwise appear that all the land in the borough was included therein. Hence there is no reason to conclude that disinterested commissioners could not have been obtained. If they were available, but in fact one or more of the commissioners who acted were interested, it is well settled that the act of 1881 would apply. The rule is that the Supreme Court may act, not only in cases where a valid assessment could have been made at the time it was attempted, but also in cases where such valid assessment could be made at the time when the Supreme Court pronounces its judgment in reviewing the defective assessment. *Brewer v. Elizabeth*, 66 N. J. L. 547; *Elizabeth v. Meeker*, 45 *Id.* 157; *Brown v. Union*, 65 *Id.* 601. And when there is a permanent board of assessment commissioners, it is not necessary that they should certify in their report as to their qualifications, but the burden is on prosecutor to show disqualification. *Batchelor v. Avon-by-the-Sea*, 78 *Id.* 503. There is nothing in the case before us to show that any of the original commissioners, or of their successors, was disqualified; and hence the argument lacks a minor premise.

The other point made is that the commissioners appointed by the court, in laying the new assessment on a graduated percentage basis, decreasing from the sea landward (the general propriety of which is not here challenged), added to the

90 N. J. L.

Phillips v. Longport.

valuation of appellant's property the value of a new building erected by appellants after the municipal improvement was made; and that the percentage could lawfully apply only to the value of the property as it existed at the time of the completion of the municipal improvement. Without conceding the impropriety of such a course, where the commissioners certify, as they have done, that the assessments do not exceed the actual benefits (and there is no proof to the contrary), the answer is that it does not appear that a percentage was assessed on the value of the new building—counsel so asserted on the argument; and members of the court expressing some doubt of this appearing in the case, counsel announced his intention of making written application for dismissal of the appeal without prejudice, in order to have the fact settled. No such application was made, but, instead, a stipulation has been submitted in this court, which it would be irregular for us to consider, as we must take the case as it was presented to the court below. In this we find only the clause in the *per curiam* of the court below, that "real estate must be assessed with respect to the value imparted to it by permanent improvements," and paragraph 6 of a stipulation of counsel certified as correct by the court below, that the commissioners "in making a reassessment against the property of appellant took into consideration the improvements upon the land made by appellant after the completion of the jetties." With respect to the former we remark that the Supreme Court states no time as of which the value imparted by permanent improvements is to be taken as the basis of assessment, and we cannot suppose that an illegal time was selected; and as to the latter it may similarly be said that the commissioners may as well have "taken into consideration" the later improvements to the land with a view of excluding them from assessment as with a view of assessing them.

In short, to work a reversal, some injurious error must be shown, as every intendment is in favor of the record. *Low-eree v. Newark*, 38 N. J. L. 151; *Demster v. Frech*, 51 *Id.* 501; *Dallas v. Newell*, 65 *Id.* 172. To raise a doubt is not

State v. Loomis.90 N. J. L.

enough. *Smith v. Newark*, 33 N. J. Eq. 545, 552. It was a simple matter to show error if it existed; but it has not been shown in any way that we can recognize on this appeal.

The judgment is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, HEPPENHEIMER, WILLIAMS, JJ. 8.

For reversal—WHITE, GARDNER, JJ. 2.

THE STATE, DEFENDANT IN ERROR, v. BRUCE E. LOOMIS
AND FRANK G. BLINN, PLAINTIFFS IN ERROR.

Submitted December 11, 1916—Decided March 5, 1917.

1. In a prosecution for violation of section 119 of the Crimes act by procuring the "miscarriage of a woman pregnant with child," it is not necessary to show that the woman was quick with child but it is sufficient if it appears that conception had taken place and gestation was in progress.
2. Where in a trial for abortion, in which the state claimed that the *fetus* had been expelled by the female, the state introduces direct evidence of the sexual intercourse with defendant on more than one occasion, of the subsequent cessation of menses, and of nervous functional disturbances, which, in the opinion of experts denoted probable pregnancy, there was sufficient proof to justify the jury in finding that pregnancy existed.

On error to the Supreme Court, whose opinion is reported in 89 N. J. L. 8.

For the plaintiffs in error, *Frank M. McDermit*.

For the state, *Jacob L. Newman*, prosecutor of the pleas, and *Andrew Van Blarcom*, assistant prosecutor.

The opinion of the court was delivered by

PARKER, J. But for the claim advanced by counsel that the Supreme Court "did not refer to or dispose of the principal objection raised to the judgment of conviction," it would in all probability be unnecessary to add anything to the opinion of that court.

The point made is this: That whereas plaintiffs in error maintained that under the statute (section 119 of the Crimes act, quoted in *State v. Mandeville*, 89 N. J. L. 228; 98 Atl. Rep. 398) it was incumbent on the state to show in a prosecution for abortion, or attempted abortion, that the female was "then pregnant with child," and that no proof of this condition had been adduced, the Supreme Court disposed of the claim as though counsel had argued that the proof must show that she was "quick with child," and by merely citing as authority the earlier case of *State v. Murphy*, 27 N. J. L. 112, in refutation of such argument.

This misapprehension of the court below, if it was in fact such, may be accounted for by the fact that in the brief, the first point, stated at the outset to be that "the state failed to prove pregnancy" and developed at considerable length, concludes with the proposition that the phrase "pregnant with child" in the statute means "quick with child," and that the burden of so proving did in law rest upon the state. If counsel stands on this latter proposition, the opinion of the Chief Justice in the Supreme Court is adequate; if on the other, then the question is whether there was evidence to justify the jury in finding pregnancy, i. e., the existence of the condition beginning at the moment of conception, and terminating with delivery of the child. 1 C. J. 312; *State v. Howard*, 32 Vt. 380; *State v. Murphy*, *supra*; *Powe v. State*, 48 N. J. L. 34, 35.

There was ample proof to go to a jury on this question, and full justification for their finding if they believed the evidence, as they were entitled to do. There was direct evidence of sexual intercourse with defendant Loomis on more than one occasion; of the subsequent cessation of menses;

State v. Loomis.

90 N. J. L.

of nervous and functional disturbances which, in the opinion of medical experts for the state, denoted probable pregnancy.

Absolute demonstration was, of course, impossible, especially as it was claimed that the *fetus* had been expelled. The point was properly ruled against the defendants.

Several other points, not specifically treated by the Supreme Court, may be noticed here—(1) That there was no proof of an intent that an abortion should take place. Upon the evidence examined by us, this seems frivolous. (2) The statement in the charge that a state expert had testified that certain specified symptoms showed the probable existence of pregnancy. The recital of the evidence was correct. (3) Questioning of a state witness by the prosecutor as to statements made by her to the grand jury inconsistent with her testimony. This was proper under the rule laid down in *State v. Bovino*, 89 N. J. L. 586. (4) The charge that what had been said to the jury (evidently by counsel in summing up) that the question of “reasonableness of an attempt by a person who gets a woman into trouble to assist her in getting out” should not be given any weight by the jury, &c. The court properly took the view that when the statute denounced a certain course of conduct as criminal, the guilty participation of a defendant in acts which preceded and caused the pregnancy that led to the criminal abortion was irrelevant as a defence. A reading of the charge makes it obvious that these remarks of the court were provoked by the summing up of counsel, and in this aspect they were doubly pertinent.

The judgment is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L.Eisele & King v. Raphael.

JOHN EISELE AND NATHANIEL KING, PARTNERS, TRADING AS EISELE & KING, RESPONDENT, v. ELIAS RAPHAEL, APPELLANT.

Argued December 1, 1916—Decided June 18, 1917.

Rule 80 of the Supreme Court declares that a frivolous or sham plea may be stricken out, upon proper affidavit in support of a motion for that purpose, unless the defendant by affidavit or other proof shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. Under this rule the finding of the judge must be taken as true until the contrary appears, and this is so when an appeal is taken from such an order as permitted by section 15 of the Practice act of 1912.

On appeal from an order of the Supreme Court striking out answer and entering judgment.

For the appellant, *Levitan & Levitan*.

For the respondent, *Edgar W. Hunt*.

The opinion of the court was delivered by

BERGEN, J. This action was brought by the plaintiffs to recover from the defendant a balance due on an account relating to the purchase and sale of the capital stock of certain corporations, bought and sold on what is commonly called a margin, which it is alleged the defendant refused to take up and pay for, and thereupon plaintiffs sold the stocks on the New York stock exchange for less than they cost. The defendant had made a deposit to be applied on account of such purchases pledging the stock to secure the balance of the purchase price advanced by the plaintiffs, and recovery is sought for the difference between the sum of the proceeds of the sale and deposit and the cost. The answer denied each paragraph of the complaint in such a manner as to amount to a general denial of all the allegations set out in it, and then stated, as separate defences—(1) that the complaint did not state a cause of action. We think that the complaint does state a

Elsele & King v. Raphael.90 N. J. L.

cause of action; (2) that defendant had on deposit with the plaintiffs certain shares of stock which they sold without sufficient notice to the defendant; (3) that when the deposit of the defendant was exhausted plaintiffs continued to buy and sell stocks for the defendant's account without demanding an additional margin. This, if true, would be no defence if the defendant gave orders to purchase and they were executed, for it was nothing more than extending him credit. Defendant also filed a counter-claim for the deposit and an alleged conversion of stock which the defendant claims the plaintiffs had purchased for him. The plaintiffs moved to strike out the answer and counter-claim as frivolous and sham, which motion was heard by a justice of the Supreme Court on affidavits read on behalf of plaintiffs and answering affidavit of the defendant. The justice struck out the answer and counter-claim and ordered a judgment for plaintiffs from which the defendant has appealed.

That an order striking out an answer and the entering of a summary judgment rested in discretion and was not the subject of a writ of error, prior to the Practice act of 1912, has been long settled in this state and is not open to argument (*State Mutual Building and Loan Association v. Williams*, 78 N. J. L. 720), but it is claimed that the Practice act of 1912 has altered the rule in this state. This is so to the extent of allowing an appeal and a review of such an order.

Section 15 of the new Practice act (*Pamph. L. 1912, p. 380*) provides that "subject to rules, any frivolous or sham defence to the whole or any part of the complaint may be struck out; or, if it appear probable that a defence is frivolous or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section."

This section being made expressly "subject to rules" must be read in connection with rules 80 to 84, inclusive, relating to the entry of summary judgments. Rule 80 provides that "the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show

such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

Rule 81 requires that the motion to strike out be made upon affidavit of "the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and stating the amount claimed, and his belief that there is no defence of the action." Reading the rules, to which the statute is subject, and the statute together, a plaintiff will be entitled to a summary judgment upon presenting an affidavit complying with rule 81, which should set out fully the facts upon which the cause of action is based, unless the defendant by affidavit or other proof shall show facts deemed by the judge hearing the motion sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts set up by the defendant, and his conclusion that they are not sufficient should not be set aside unless the sufficiency clearly appears. In the present case, the affidavits of the plaintiffs show that they were stock brokers; that defendant deposited with them a margin to cover stock purchases; that he ordered purchases and sales and that they advanced to him the difference between the cost of the stock and the deposit holding the stock in pledge to secure the repayment of such advances; that each purchase and sale was reported to the defendant on a printed statement containing a notice that it was understood and agreed between the defendant and plaintiffs that all stock bought for the defendant, and so held in pledge, could be sold without demand for a further margin, or notice of a sale of the stock whenever such sale was deemed necessary by the plaintiffs for their protection; that defendant refused on demand to take up and pay for the stock purchased for him or to deposit additional money to protect the plaintiffs from loss, and that they thereupon sold the stock in the open market at public sale on the New York stock exchange to protect them from further loss; that the stock did not sell for a sum which, with the deposit added, was sufficient to cover the cost, and that having exhausted the pledge there still remained a balance due to them. Without further statement of plaintiffs' proofs submitted to the judge,

Eisele & King v. Raphael.

90 N. J. L.

it is sufficient to say that by them it was conclusively shown that defendant was liable to the plaintiffs for the amount claimed.

The facts set up by the defendant's affidavit are these—(a) that he never read the agreement giving the plaintiffs the right to sell the stock without demand or notice. This, if true, would not be a defence, for the agreement was printed on every statement sent him for each purchase and sale, about eighty in number, and these he accepted and held as evidence of his contract of purchase; (b) that he did not order plaintiffs to buy certain stocks which are specifically set out, but, in the next paragraph of his affidavit, he says that these purchases were not made in September, 1915, as he had previously testified, "but by the notices in my possession appear really to have taken place in October." This is an admission that he had notice of the purchase of this stock, and he says in one of his affidavits, "I did not object when I found out because I thought the said Pope was doing the right thing by me." He now claims that these purchases were not made by his order, but, if this be true, it was his duty to object at once and not wait and have them held for him with the expectation of a profit, to be repudiated if he subsequently found that the purchase resulted in a loss. He had an account with the plaintiffs to whom he admits that he gave numerous orders to purchase and sell stocks, and, as soon as he found out that a purchase had been made for him which he had not ordered, it was his duty to promptly disavow it and not speculate on the result, which, if favorable, he could avail himself of, and, if unfavorable, repudiate. Under the facts set out in his own affidavit his conduct amounted to a ratification of the purchase; (c) that he never ordered plaintiffs to purchase two lots of stock which he names, but as the purchase and sale of these two lots resulted in a profit to him he suffered no loss, for his account has been credited with the profit and does not enter into this controversy except to his advantage; (d) that he was not given notice to make any additional deposit of a margin. This was not required under his contract, and he knew that at any time he could take up the stock purchased for him by paying the balance due.

90 N. J. L.

Eisele & King v. Raphael.

There is nothing in the defendant's affidavit which entitles him to have this court reverse the finding of the judge that he deemed the facts shown by the defendant to be insufficient to entitle him to defend.

The record shows that from September 7th to November 1st, 1915, a period of less than two months, this defendant dealt in over two thousand seven hundred shares of stock at a total cost of \$134,821, and that over eighty purchases and sales were made for him by the plaintiffs from which he reaped a profit in nearly every case except in the five transactions which he now seeks to repudiate, which shows that he was an active and rather a liberal speculator in stocks, and, in most instances, a successful one.

The order of the judge in this case declares that the answer filed is frivolous and a sham, and that the defendant failed to show such facts as he deemed sufficient to entitle him to defend. The finding of the judge must be assumed to be true until the contrary appears, and, as it does not appear in this case, the finding must be taken as correct.

Striking out a sham or frivolous plea is not an infringement of the right of trial by jury. A plea of general issue, although it denies the entire claim of the plaintiff, and, apparently, raises a question of fact, is not protected for that reason against a motion to strike out as sham or frivolous. *Coykendall v. Robinson*, 39 N. J. L. 98.

As to the counter-claim based upon the conversion of stock, we do not perceive how there could be a conversion, to defendant's injury by the sale of stock to raise the money necessary to pay a loan for the security of which the stock was pledged.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, JJ. 3.

McGuire v. Catholic Benevolent Legion.90 N. J. L.

CATHERINE MCGUIRE, ADMINISTRATRIX, APPELLANT, v.
CATHOLIC BENEVOLENT LEGION, RESPONDENT.

Submitted December 11, 1916—Decided March 5, 1917.

1. Where the constitution and by-laws of a beneficial order permit a member at his option to change the character of his membership by surrendering a certificate assuring the payment of a fixed sum at death, and have another certificate issued in its stead fixing a less sum to be paid, in consideration of a reduction of the amount of the dues payable for the assurance, if he shall comply with certain conditions set out in the constitution and by-laws which are made a part of the contract of assurance, the procedure and conditions required by the contract to accomplish such change must be complied with and the new certificate issued before an action at law can be maintained to recover what would be due if the change had been made, a new certificate issued, and its terms performed by the assured.
2. If a proper application for a new certificate be refused by the subordinate council and the rules of the order provide for an appeal from such refusal to the supreme council, that remedy must be exhausted by the applicant before a right of action arises for damages caused by the refusal of the subordinate council to grant the application.

On appeal from the Supreme Court.

For the appellant, *Kalisch & Kalisch*.

For the respondent, *Butler & Brown*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff's intestate was the holder of a certificate issued by the defendant corporation which entitled his beneficiaries to \$3,000 at his death, or, in case of his permanent disability and the surrender of the certificate, to a new certificate for \$1,500, payable at his death, upon which dues but no assessments were required to be paid. The plaintiff, as his administrator, brought this suit to recover \$1,500, notwithstanding there was no surrender of the old

certificate, or a new one issued, upon the ground that the assured had, in his lifetime, become permanently disabled and taken the necessary steps to entitle him to a new certificate for that sum.

The trial court ordered a judgment of nonsuit from which plaintiff has appealed. The nonsuit was allowed for two reasons—*first*, because the assured had not made such application as the constitution and by-laws of the defendant corporation required to entitle him to the payment because permanently disabled, and *second*, that the by-laws provide for an appeal to the supreme council of the order from all matters of importance emanating from subordinate councils thereof. The certificate in question was issued by the supreme council of the order to Thomas Doolan, the intestate, as a member of Woodbridge Council, No. 120, located at Woodbridge, New Jersey, and upon condition therein expressed that he would strictly comply with the laws, rules and regulations of the legion now in force, or which might thereafter be adopted by it, and the certificate was accepted in writing by Doolan on the conditions therein named. The constitution of the order provides for the establishment of subordinate councils—Woodbridge Council, of which Doolan was a member, being one.

Section 24 of the by-laws of the order permits any member in good standing, who shall arrive at the age of seventy years, and who shall become permanently disabled, at his option, upon payment of all dues and assessments and surrender of his benefit certificate to the secretary of his subordinate council, to have issued to him a new certificate for one-half the face value of the one surrendered, and thereafter not be required to pay any assessments, but, in order to retain his membership and rights under the new certificate, he is required to comply with the laws of the order and pay his dues and other charges, in default of which he may be suspended and thereby forfeit all rights under the new certificate.

By section 12, when such application is made, the president of that council must appoint a committee to investigate and report upon the application, and the secretary notify all other

McGuire v. Catholic Benevolent Legion.

90 N. J. L.

councils within a given district of such application, and that the president of each of such councils shall appoint a member of his council to act in an advisory capacity with the investigating committee. If the report be favorable a ballot is to be taken, and if the application be granted, notice thereof given to the secretary of the supreme council, and if approved by the supreme council, a new certificate issued. It is not pretended that the assured ever surrendered the original certificate or availed himself of this procedure, or that whether he was permanently disabled, was investigated. All the plaintiff claims is that the assured in 1911 went to the secretary of the supreme council, in Brooklyn, and consulted him concerning the obtaining of a certificate of permanent disability, and when there, he then signed some paper relating to it, and that the secretary said he would look into the matter, but that nothing further was done. Manifestly, the secretary of the supreme council had no authority under the rules and regulations of the order to issue a new certificate, nor to make an enforceable agreement that the supreme council would issue one, for the by-laws provide the only method by which such a certificate could issue. The assured made no payments, not even the dues he was bound to pay even if the new certificate had been issued, after 1911, and he died March 3d, 1915, and he was suspended from the order in November, 1911, over three years before his death. We think the trial court was right in granting the nonsuit, for without the certificate based upon permanent disability the action to recover the sum it would have represented if issued had no legal foundation.

If the subordinate council, upon a proper case made, had refused to issue the certificate, then the remedy of the assured was, in the first instance, by an appeal to the supreme council. Section 2 of the constitution provides that the supreme council shall be the body to which final appeals shall be made, and section 12 of the by-laws makes the decision of the president of the subordinate council final if no appeal be taken to the supreme council within thirty days. Neither the constitution or the by-laws impose an absolute duty to issue the certificate,

but its issuance depends upon the result of an investigation and determination of the rights of the assured under the constitution and by-laws. By the terms of his contract he is required to submit his application to the adjudication of the subordinate council, and if it refuses, then to appeal to the supreme council. This course was not pursued by the assured, and so if he had laid a proper foundation for the allowance of his application, he did not exhaust his remedy within the order, as he was bound to do by appeal to the supreme council. *Ocean Castle v. Smith*, 58 N. J. L. 545.

He was not seeking to recover a money claim, but a change in the character of his membership which required the payment of dues alone and the exemption from all assessments, in consideration of a reduction of the sum payable at death, a matter controlled alone by the rules of the order. The present suit is based upon the assumption that the certificate should have been issued without following the method which the contract required. At the time of his death he held the original certificate which fixed the class of his membership, and he was no longer a member under it, having been suspended for non-payment of dues and assessments, to which he submitted for over three years without appeal.

The nonsuit was properly allowed for both reasons, and the judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

Nevich v. D., L. & W. R. R. Co.90 N. J. L.

STEPHEN NEVICH, RESPONDENT, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

1. The petitioner for compensation under our Workmen's Compensation act, was using a barrel as one of the implements of his service; two strangers carried it away a short distance and petitioner was directed by his immediate superior, one of the servants of his employer, to recover it, and when petitioner approached the strangers they threw the barrel down and assaulted him and he was severely injured. *Held*, that the accident arose out of and in the course of his employment.
2. In a case under the Workmen's Compensation act, where the facts are disputed, a finding in favor of either party will not be disturbed, if there be evidence to support it, for a reviewing court will not weigh the evidence, the decision of the trial judge being, under the statute, conclusive if there be any evidence to support it.

On appeal from the Supreme Court.

For the respondent, *William Perlis*.

For the appellant, *Frederic B. Scott*.

The opinion of the court was delivered by

BERGEN, J. The petitioner filed his petition with the Court of Common Pleas of the county of Hudson, praying that defendant compensate him for injuries as required by the Workmen's Compensation act. The court found that he was employed by the defendant, and that the accident which caused the injuries arose out of and in the course of such employment, and that the petitioner was entitled to compensation based upon a total and permanent disability, and awarded compensation according to such finding. The defendant removed this judgment by *certiorari* to the Supreme Court for review, and assigned as reasons for reversal that the accident did not arise in the course and out of the employment, and also that the injuries did not result in a permanent total disability.

90 N. J. L.Nevich v. D., L. & W. R. R. Co.

The Supreme Court affirmed so much of the judgment of the Common Pleas as adjudged that the accident arose in the course and out of the employment of the petitioner, and reversed the "findings as to the extent of petitioner-respondent's injuries." From this judgment both parties have appealed, the defendant from the affirmance of liability, and the petitioner from the reversal relating to the extent of his injuries. The testimony upon which the liability of the defendant was based by the Common Pleas, and the affirmance by the Supreme Court, is substantially as follows: The work to which the petitioner was assigned by the defendant was the filling of a barrel with water, and the carrying of the water in pails to other servants of defendant to be used in mixing cement, and, while temporarily away from it, two strangers upset the barrel, carried it for a short distance, and at this point the superior, or boss, of petitioner directed him to get the barrel and bring it back. This he undertook to do, and when he approached the men they threw down the barrel and assaulted him, inflicting the injuries for which he asks compensation. As there was testimony tending to show that the superior of the petitioner directed him to get the barrel while it was in the hands of the persons carrying it away, there can be no doubt that the accident happened in the course of his employment and also that it arose out of his employment, for he was reclaiming his employer's property, by his direction, from persons who were attempting to remove, without color of right, a part of the tools used by him in the performance of his service, and being directed by the defendant to reclaim the barrel, with knowledge of the existing conditions, one being a possibility that the recovery of the property might be resisted, we are of opinion that the accident arose out of the employment, as well as in the course of it, and that the judgment of the Supreme Court on this branch of the case should be affirmed.

In reversing in part the judgment of the Common Pleas, the Supreme Court said that there was no evidence to support the finding of total permanent disability. If there was such evidence, then the judgment of reversal was erroneous,

Nevich v. D., L. & W. R. R. Co.

90 N. J. L.

for in cases of this class the Supreme Court is not authorized to determine the preponderance or weight of testimony, for the statute declares that the decision of the judgment of the Court of Common Pleas "as to all questions of fact shall be conclusive and binding." *Pamph. L.* 1911, p. 134, § 18; *vide Sexton v. Newark District Telegraph Co.*, 84 N. J. L. 85; *Hulley v. Moosbrugger*, 88 *Id.* 161. We are of opinion that there is evidence in this record which supports the finding of the Court of Common Pleas. Doctor King, called by the petitioner as a medical expert, testified that he had made a thorough examination of the petitioner; that he is suffering from a nervous disease called corhea, commonly known as St. Vitus's dance, which seldom afflicts people of his age, and from which an adult rarely recovers; that it may be produced by a blow on the head, such as petitioner testified was given him when he was injured; that the blow and consequent condition would indicate a grave lesion of the motor area of the brain, and that at the time of the trial petitioner was entirely incapacitated to perform any work—"total disability from any manual labor." In addition to this, the petitioner testified that he was struck on the head with a piece of iron and fell unconscious; this was in September, 1914, and the hearing on the petition was in October, 1915, during which period he had been unable to work and was in the same condition as when he left the hospital, where he remained seven weeks following the accident, and that when he first became conscious he was trembling as when he appeared as a witness, but not quite so much. "I am worse now."

His wife testified that before the accident he was in good health, had no shaking and convulsions such as he was now suffering, and that he had grown worse since he left the hospital.

We are of opinion that this testimony justifies the inference drawn by the Court of Common Pleas that the injuries produced a total permanent disability within the meaning of the statute. The result which we reach is that on the appeal of the defendant, the judgment of the Supreme Court

90 N. J. L. Reed v. Atlantic City & Sub. Gas & Fuel Co.

that the accident arose out of and in the course of the petitioner's employment should be affirmed, and that so much of the judgment from which the petitioner appeals should be reversed, and the judgment of the Court of Common Pleas of the county of Hudson affirmed.

On appeal of Delaware, Lackawanna and Western Railroad Company—

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

On appeal of Stephen Nevich—

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

JOHN C. REED, APPELLANT, v. ATLANTIC CITY AND SUB-URBAN GAS AND FUEL COMPANY, RESPONDENT.

Argued November 22, 1916—Decided March 5, 1917.

The president and general manager of a corporation having control of its books of account and the direction of entries made therein, claiming to have loaned the corporation money, brought suit to recover, and the corporation, under a new management, set up payment. The plaintiff's account in the ledger as kept while plaintiff was in control, showed a credit to plaintiff for the amount of the loan and a debit for a like sum, the entries having been made by plaintiff's agent by his direction. *Held*, that the ledger was admissible evidence of an admission by plaintiff that the loan was satisfied, the entry made by him being against interest.

Reed v. Atlantic City & Sub. Gas & Fuel Co. 90 N. J. L.

On appeal from the Supreme Court.

For the appellant, *Wilson & Carr*.

For the respondent, *Thompson & Smathers*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff brought his action to recover from defendant \$2,500, which he claims he loaned it, and having offered in evidence two checks representing together that sum, which were deposited in bank to the credit of the company, with proof that the money was used to pay interest on the bonds of the company, rested his case. The defence was payment, and the principal evidence to support this was the ledger of the company containing the account of the plaintiff, which showed that he was credited with the loan and debited with an equal amount under the item "Bills payable," so that the account appeared to be balanced. There was evidence from which a jury might infer that plaintiff was the president and general manager of the company having possession and control of its books of account, and that the entries in question were made by his clerk as his agent and by his direction, the company not having a book-keeper; that the management of the financial affairs of the defendant and its accounts were under the control of the plaintiff, and that he had sufficient familiarity with the entries in the ledger to justify charging him with actual knowledge. The ledger account also disclosed that other loans had been made by plaintiff which were satisfied by a credit entry of "Bills payable," which loans, it is not denied, have been satisfied. The jury found for the defendant, and the plaintiff appeals.

The ground in support of the appeal most seriously urged is that the ledger was improperly admitted in evidence. The offer was not for the purpose of proving a book account, but the admission of the plaintiff that the loan had been satisfied.

We are of opinion that the book containing plaintiff's entry of satisfaction of the debt was competent as an admission against interest. It was not used to establish a claim,

90 N. J. L. Reed v. Atlantic City & Sub. Gas & Fuel Co.

but as a written admission by plaintiff that his loan had been satisfied, and the entry by his agent under his direction is the same as if he had written it. "A party's own statements may always be used against him as admissions; hence the opponent may always offer the party's books as containing admissions favoring the opponent's claim of facts." 2 *Wigm. Ev.*, § 1557.

Entries in the books of a corporation showing dealings with its manager are competent evidence against him if it appears that he has sufficient connection and familiarity with them to justify actual knowledge of their contents, "on the basis of admissions or assertions of the facts stated therein." *Foster v. U. S.*, 101 C. C. A. 485, 495.

In *Bird v. Magowan*, 43 *Atl. Rep.* 278, the bill was filed against directors who, it was claimed, had unlawfully abstracted large sums of money belonging to the corporation, which was shown by charges against Magowan on the books of the corporation, and Vice Chancellor Reed held that charges against an officer of the company, known to him, and not objected to by him are competent evidence as admissions. In the present case, an inference may be drawn from the testimony that plaintiff caused the debit entry to be made, and, if so, it is evidence of his admission that the loan has been satisfied. He now denies that the debt was paid, or that he had knowledge of the satisfying entry, but the truth of this denial is met by his admission that it was paid, as shown by the entry made by his direction, if the jury drew such an inference from the testimony, and his knowledge that such entry existed may be inferred from his position as manager having charge of the books, and his direction to his clerk to make the entries. There was no error in the admission of the ledger for the purpose of showing plaintiff's admission that the debt had been liquidated. This view makes it unimportant whether all the books of account of the corporation were produced or not. The plaintiff was the manager, having in his possession all the books, and when the control passed from him, he claims to have turned them over to the new management.

Reed v. Atlantic City & Sub. Gas & Fuel Co. 90 N. J. L.

There was proof that all the books bearing on the question of accounts which were passed over were a cash-book and ledger, and they were produced, but, under the view we take, it was sufficient to produce only the book which contained the admission of payment. There is a wide difference between establishing a claim by the production of books of account and the proof of an admitted payment of such claim appearing in the ledger kept under the direction of the claimant. Such admission may be proved by any writing made by one seeking to enforce a claim.

The foregoing conclusion disposes of the exception to the refusal to direct a verdict for plaintiff, because it was for the jury to determine the controverted fact of payment. The permissible inference of payment to be drawn from the entries made by the plaintiff in the ledger was met by his denial thereof, as well as knowledge of the entry, and this raised a jury question which the court properly left to it.

It is urged that it was error to refuse a request to charge, "The payment by Reed (the plaintiff) to the company of the sum of \$2,500 as a loan, casts upon the defendant the legal duty of repaying the same to Reed."

This was in effect charged, for the court, after stating the plaintiff's testimony in support of his claim that he had loaned \$2,500 to the company, said: "If what the plaintiff says be true, he is entitled to have a verdict for \$2,500." As to the other requests refused, to which exceptions were taken, it is sufficient to say that they are not argued in the brief.

We have examined the ground of appeal relating to the admission of testimony to which plaintiff objected, and find no error which warrants a reversal of this judgment, and it will be affirmed, with costs.

For affirmance—THE CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—THE CHANCELLOR. 1.

90 N. J. L. Shoemaker v. Phillipsburg Horse Car R. R. Co.

GEORGE W. SHOEFFLER, APPELLANT, v. PHILLIPSBURG
HORSE CAR RAILROAD COMPANY, RESPONDENT.

Submitted December 11, 1916—Decided March 5, 1917.

1. An excerpt from instructions to a jury upon which error is assigned must be read in connection with the context and if, when taken together, no error appears, the excerpt alone will not support the assignment.
2. The trial court in charging the jury as to the amount of force to be used in ejecting a passenger improperly on defendant's car said, by way of illustration, that if a passenger refused to leave the car, "And he pushed him off, that is all that would be necessary." *Held*, that this was not an instruction that defendant might push a passenger off the car regardless of consequences, the words "Would be necessary" meaning, in the connection used, that if the push accomplished the ejection, that was all the force defendant was permitted to use. In other words, the defendant had used all the force that was necessary under the conditions stated.

On appeal from the Warren County Circuit Court.

For the appellant, *William C. Gebhardt*.

For the respondent, *William H. Walters* and *William H. Morrow*.

The opinion of the court was delivered by

BERGEN, J. The defendant operates a street railway, and one of its rules require passengers to enter their cars through the rear door except during hours when the conductor is required to leave it to change a derailing switch at a steam railroad crossing. Plaintiff attempted to enter by the front door during the period when all passengers were required to board it in the rear, and the motorman told him to get off and get on the other end, which request he refused, and the motorman pushed him off. Plaintiff claims that more force was used than was necessary, causing injuries for which he

Shoeffler v. Phillipsburg Horse Car R. R. Co. 90 N. J. L.

brought a suit, resulting in a judgment for defendant from which plaintiff appeals.

The principal ground urged in support of the appeal is that the rule was an unreasonable one, and that, therefore, the court erred in charging the jury that the motorman had the right to use as much force as was necessary to remove plaintiff from the front end of the car; and second, in charging that defendant had a right to push the plaintiff off without any warning that he intended to do it. That plaintiff knew that there was such a rule appears from his testimony, which was, in part, as follows:

"Q. You understood it was his wish for you to go to the rear of the car and get on?

"A. I presume that is true.

"Q. And you knew that was just according to the notice on the car, that you should enter by the rear door, didn't you?

"A. Yes, sir."

The court charged that the rule was a reasonable one, and no exception was taken to this, the exception being limited to that part which instructed the jury that defendant's servant had the right to use reasonable force to carry it out. The part of the charge which the plaintiff most complains of is this: "Or if a man got on the car and the motorman said, 'Get off and go to the rear door,' and he said 'I don't feel like it,' and he pushed him off, that is all that would be necessary."

From this, plaintiff argues that the court told the jury that the motorman had a right to push the plaintiff off the car, not merely to use as much force as was necessary to remove defendant from the car, but to push him off without regard to consequences.

An excerpt from a charge to a jury must always be read in connection with its context, and in doing so in this case, we find that the court was instructing the jury concerning the necessary force required in a given case, and that if there be resistance, that the force is to be measured by the amount

90 N. J. L. Shoemaker v. Phillipsburg Horse Car R. R. Co.

of the resistance, and, by way of illustration, said that if a motorman requested a person to get off and enter by the rear door, and the request was complied with, there would be no need of force beyond the request, and then follows what is above quoted, which amounts to nothing more than saying that if there was a refusal, and a push was sufficient to put him off, the push would be all the force which the circumstances justified. It was not an instruction that a push was justifiable under all circumstances. The question whether more force was used than necessary to induce plaintiff to comply with the rule was distinctly left to the jury.

The second proposition that the court charged that defendant had a right to push plaintiff from the car without warning is without merit. No such instruction appears in the charge, and no request to charge that warning was required was submitted, and if it had been, it would have been properly refused, for plaintiff testified that he knew the rule required him to enter by the rear and that he was requested to comply with that rule.

There is no error in the charge to which any exception was taken and noted on the record. The other points argued relate mainly to the weight of the evidence, which cannot be considered on this appeal.

The judgment under review is affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

Crossley v. Connolly Co.

90 N. J. L.

JAMES E. CROSSLEY, RESPONDENT, v. WILLIAM H. CONNOLLY COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

Where the defendant, in a District Court, demanded a trial by jury, and during the progress of the trial, the court, upon the motion of the plaintiff, dismissed the jury, and adjourned the case, and upon the next day fixed for the trial under the objection of the defendant proceeded to hear the case without a jury, and gave judgment for the plaintiff—*Held*, that the proceeding was irregular, and that the defendant under the circumstances, could not be deprived of his right to a trial by jury.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 55.

For the respondent, *Gaetano M. Belfatto*.

For the appellant, *Newton P. Kinsey*.

The opinion of the court was delivered by

MINTURN, J. Process having been issued out of the District Court of East Orange, the defendant within the time required by law demanded a trial by jury, upon which demand a *venire* was duly issued, and the parties upon the day set for the trial proceeded therewith. It became apparent to the plaintiff's attorney, as he presented his case, that he would be unable to prove an essential fact without the presence of the president of defendant company, who, having been present in the court room, but without service of subpoena by the plaintiff upon him, had departed. Confronted with this situation, the plaintiff's attorney moved for an adjournment of the trial, which the court, under objection by defendant's attorney, granted, having previously denied a motion to nonsuit upon the ground of plaintiff's inability to prove his case.

Upon the next trial day, the court under the objection of defendant, proceeded to hear and determine the case without a jury, none having been demanded for that day, and rendered a judgment for the plaintiff, from which judgment the defendant appealed to the Supreme Court, where the judgment was affirmed, from which affirmance the present appeal was taken.

The substantial inquiry presented by these facts is whether the trial court deprived the defendant of his statutory right of a trial by jury. The question resolves itself essentially into one of procedure, and since the District Court is a court of statutory origin, the relative rights of the parties must be deduced from the express provisions and the spirit of the statute.

Causes ordinarily are tried before the District Court without a jury, except in one contingency, when the court by the express provisions of the statute is deprived of that power. Section 149 of the District Court act provides (*Comp. Stat.*, p. 1999) :

"Either party may demand a trial by jury * * * unless a demand for trial by jury shall be made * * * and unless the party demanding the same shall at the time of making such demand pay the cost of the *venire*, the demand for trial by jury shall be deemed to be waived * * *."

This section of the act received the consideration of the Supreme Court at the June term of 1893, in the case of *Clayton v. Clark*, 55 N. J. L. 539, 542, wherein Mr. Justice Garrison observed: "The legislature has made the right to a jury absolute, if demanded at the proper time. The defendant has had no voice in choosing the forum, hence has submitted himself to no implied conditions arising from its construction. He is there *in invitum* with the right to question the constitutionality of the procedure in all its steps, and to ignore utterly all innovations upon his common law rights, for which express legislative authority does not exist."

Adverting to this construction of the act, the Supreme Court at the following term, by Mr. Justice Abbott, declared that "a demand for a jury made by the defendant at the proper time, deprives the court of jurisdiction to try the case

Crossley v. Connolly Co.

90 N. J. L.

otherwise than by a jury." *Raphael v. Lane*, 56 N. J. L. 108, 114.

It will suffice, for the determination of the case *sub judice*, to declare that we concur in this construction of the provision of the act under consideration. The inquiry results whether, in such a situation, no legislative provision having been made for the return of the same jury, or the payment of the cost of a subsequent *venire*, the District Court may order an adjournment of a jury trial and impose upon the defendant, *ex necessitate*, the cost of another *venire*, for the trial of the case upon the adjourned day.

Whereas, in this case, it is manifest that the plaintiff's demand was brought about by no dereliction or default upon the part of the defendant, the rights of the latter to the form of trial conceded to him by the statute, and which he has elected to adopt in conformity with the statutory procedure, should in nowise be jeopardized by the action of the court. Neither the plaintiff's unwillingness to proceed, nor the trial court's recognition of his right to an adjournment, should be so determined as to deprive the defendant of a right secured to him by law.

The practical equitable procedure in such an exigency would dictate that the postponement requested be granted upon terms which would impose upon the party demanding it the costs incident to the issuing of another *venire*, so that upon the adjourned day the parties may be restored to the *status quo ante*.

The judgment of the Supreme Court will be reversed, and the record will be remitted to the District Court for a *venire de novo*.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

90 N. J. L.Martin v. Baldwin.

EDWARD W. MARTIN, RESPONDENT, v. ALFRED F. BALDWIN, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

The plaintiff was owner of some real estate, which he was induced to part with, by the defendant, in exchange for a bond and mortgage for \$3,000 which it was represented to him was made by a responsible business man, who was owner of the property. The fact turned out to be, that the so-called owner was a "dummy," who was paid by defendant to represent himself as owner, and to exercise acts of ownership about the property, as well as to execute the bond and mortgage, which was without consideration, and valueless. In an action for deceit, the jury having found for the plaintiff, no errors of procedure or errors in the charge of the court being apparent, the judgment is affirmed.

On appeal from the Supreme Court.For the respondent, *Jacob L. Newman*.For the appellant, *Howe & Davis*.

The opinion of the court was delivered by

MINTURN, J. The plaintiff, Martin, was owner of two lots in East Orange, and the defendant, Baldwin, according to the allegations of the complaint, induced him to part with the property in consideration of the assignment to him of a bond and mortgage for \$3,000 upon a house and lot in Montclair, the mortgage being a second mortgage held by one P. Frank Stone, a client of the defendant. The representation which induced the sale was that the Improved Building and Loan Association of Newark held upon the Montclair property a mortgage for \$5,000; that the property was of the value of \$11,000, and that Stone had purchased it at that figure, paying the difference above the first mortgage in cash, from the Fairchild-Baldwin Company, with which the defendant was connected; that the property was about to be purchased from Stone by one James Hendrickson, who was to give Stone the

Martin v. Baldwin.

90 N. J. L.

\$3,000 mortgage; that Hendrickson was a responsible plumber, who could pay the charges incident to the mortgage, and would discharge the second mortgage by monthly payments until its final payment at maturity on July 1st, 1915; that the mortgage was a *bona fide* security, and represented an equity in the property over and above the first mortgage; that Hendrickson had purchased it for the purpose of a home and residence which he intended to occupy.

In pursuance of these representations a written agreement was executed between the parties for the mutual transfers of the respective titles, and, subsequently, the actual transfers were made. Plaintiff thereafter sold the bond and mortgage to one Marsh, and guaranteed its payment; subsequently, Baldwin called upon Marsh and informed him that Hendrickson was embarrassed financially, and was unable to meet the interest charges on either of the mortgages, and offered Marsh a conveyance of the mortgaged premises, for the purpose of saving the expense of a foreclosure, which proposal Marsh accepted, and on the same day conveyed the premises to the plaintiff. These allegations are supplemented by a general charge that the scheme thus outlined was concocted by Baldwin and Stone, knowing its essential falsity, for the purpose of inducing the plaintiff to part with his property, for an exchange that in truth possessed no market value, and by means of this deceit thus cheated and defrauded the plaintiff. Upon the trial a nonsuit was granted as to Stone, and the case proceeded against the defendant, Baldwin.

There was ample testimony adduced at the trial to support the allegations of the complaint, as to Baldwin. It was shown by Hendrickson himself that he was in reality a hired "dummy," without any business or financial responsibility, drafted into the service of defendant, for the sole purpose of assuming a status of business and financial responsibility, which he did not in reality possess; that he had not advanced any consideration for the property above the first mortgage, and that the market value of the second mortgage was merely nominal; that he was paid \$25 by the Fairchild-Baldwin Company at the request of defendant for his services in

90 N. J. L.

Martin v. Baldwin.

executing the bond and mortgage, and that in part performance for the consideration he assumed the position of owner of the property; and upon a visit which he was directed to make thereto that he divested himself of his working clothes, and clothed himself in raiment compatible with the deceptive role, in which he was thus called upon to masquerade.

This situation, supplemented by testimony from which the jury might infer all the elements of a scheme to cheat and defraud the plaintiff, presented a *prima facie* case of deceit.

To this was superadded the fact that the mortgaged premises were sold by the first mortgagee at sheriff's sale under foreclosure, and the mortgage of the plaintiff being thereby extinguished became practically valueless. The denial of these essential facts by the defendant manifestly presented a jury question which was resolved in favor of the plaintiff.

We have examined the exceptions presented by the record, as to the admission and exclusion of testimony, and it must suffice to say that in no specific instance do we find the rulings in that regard erroneous.

The refusal of the court to admit in evidence a contract between the Fairchild-Baldwin Company, the former owner of the exchanged real estate, with one Wakeman, for the purpose of showing the value of the property, was not improper, since the issue involved was not the true value of the property exchanged, but whether the representations as to Hendrickson upon which the plaintiff had been induced to accept the mortgage and part with his property had any basis in fact. In fair dealing the plaintiff was entitled to know the real owner of the mortgaged property, and his business and financial status, for the purpose of determining the value of his bond, as an added asset to the value of the property; or at least he was entitled not to have the real character and standing of the alleged owner misrepresented to him; and that inquiry presented the gravamen of the action.

Nor do we think the court erred in refusing to charge, that if the defendant was merely the agent of the Fairchild-Baldwin Company, which was acting for Stone, no liability for his individual misfeasance could attach to him. The law is other-

Martin v. Baldwin.

90 N. J. L.

wise. 2 *Corp. Jur.* 826, and cases cited; 20 *Cyc.* 85, and cases cited.

In *Bennett v. Ives*, 30 *Conn.* 329, it was held that "the actual perpetrator of a positive and obvious wrong can never exonerate himself from personal liability by showing that he was acting as the agent or servant of another, or even by his superior's command." This rule was adopted in *Carew v. Rutherford*, 106 *Mass.* 1, and adverted to and adopted in this state in *Horner v. Lawrence*, 37 *N. J. L.* 46; in *Bocchino v. Cook*, 67 *Id.* 467, and in *White v. New York, Susquehanna and Western Railway Co.*, 68 *Id.* 123.

This test of the defendant's liability imposed upon him the duty, at least, to refrain from actively perpetrating a fraud in his own interest, or in the interest of his principal, to the detriment and damage of another.

The charge of the trial court was in consonance with this rule of law and morals, and our attention has not been called in the exceptions to any erroneous application of it.

Nor are we able to discover in the charge any misdirection as to the rule of damages applicable to the situation. The rule itself, settled beyond controversy, by years of repeated adjudication, and the critical analysis of text-writers, is stated generally to be compensation adequate to the loss sustained. The effort always is to so apply the rule as to produce reparation in the individual case; and with that purpose in view, appellate pronouncements in particular cases might be multiplied.

For our purpose the potent analysis and wealth of illustration, applied by Chief Justice Beasley and Chancellor Zabriskie in *Crater v. Binninger*, 33 *N. J. L.* 513, supply the rationale of the doctrine, and settle the rule in this state beyond the pale of controversy.

The defendant's application of the rule is based upon the notion that the transaction was, in essence, the exchange of real estate; but quite manifestly it was simply the loss of the bond and mortgage, plus the necessary and incidental outlay in living up to the transaction on the part of the plaintiff.

90 N. J. L.

Whitcomb v. Brant.

Our examination of the various elements and items of loss which entered into the plaintiff's calculation of damage, the correctness of which was left to the jury to determine, satisfies us that in this respect no error was committed.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

JAMES A. WHITCOMB, APPELLANT, v. R. RUSSELL BRANT.
RESPONDENT.

Argued November 28, 1916—Decided March 5, 1917.

The plaintiff leased certain premises, in the city of Newark from defendant, and having occupied under the lease for a period, attempted to induce the landlord to accept a surrender of the same, which the latter declined to do. The plaintiff then abandoned the premises, and the landlord after an interim of two months, during which the premises remained unoccupied, rented them for a period of years, at an increased rent. The plaintiff basing his complaint on the doctrine of *assumpsit*, instituted suit for the recovery of the excess rent from the landlord; the complaint on motion was stricken out, as not alleging a valid cause of action. *Held*, that since the plaintiff had abandoned the premises, he could claim no interest, either upon the theory of privity of estate or privity of contract, above the amount of rent for which he was obligated under his covenant. *Held, further*, that since the doctrine of *assumpsit* is based upon an implied promise invoked by the law, upon equitable considerations, it can lend no support to a claim by one who while he repudiates his express covenant, seeks at the same time to invoke it as a basis for a claim to incidental profit.

On appeal from an order striking out complaint at Essex Circuit.

Whitcomb v. Brant.90 N. J. L.

For the appellant, *William L. Brunyate* and *Joseph M. Gazzam* (of the New York bar).

For the respondent, *Lum, Tambllyn & Colyer*.

The opinion of the court was delivered by

MINTURN, J. The complaint in this case was stricken out at the Circuit, and from that order this appeal has been taken. The situation presented is as though a demurrer under the former practice had been interposed to the declaration.

The complaint alleges that about April 10th, 1906, the plaintiff entered into a written lease under seal, for a term of years, with defendant, as owner of certain premises in the city of Newark, at the annual rental of \$2,400, payable in equal monthly installments. In April, 1912, the plaintiff notified defendant that he had no further use for the premises, and plaintiff then procured one Forster to enter as sub-lessee, at the same rent for the remainder of the term. Defendant refused to allow Forster to enter, and plaintiff then offered to surrender the premises, and induce Forster to enter as defendant's tenant, which offer defendant also refused.

In May, 1912, the plaintiff ceased to occupy the premises, and offered to surrender same, but this also the defendant refused.

The lease contained this covenant:

"If the said premises shall become vacant or be deserted during the said term, said party of the second part (Whitcomb, the tenant) does hereby authorize the said party of the first part (Brant, the landlord), his heirs, assigns, agents or attorneys, to re-enter the same, at his or their option, and re-let them, and receive and apply the rent so received to the payment of the rent due by these presents."

For about two months the premises remained unoccupied, but on July 5th, 1912, the defendant let the same to Forster for a term of years, expiring on May 1st, 1915, at an annual rent of \$2,700, payable in monthly installments of \$225, being an increase of \$300 annually over the former lease.

90 N. J. L.

Whitcomb v. Brant.

The plaintiff conceiving that this increased rental was his property instituted this suit to recover it.

The concrete question thus presented is whether, upon such a state of facts, an action in *assumpsit* can be maintained. The theory upon which it is sought to be maintained is that the plaintiff's estate as a tenant was never terminated, and, in the language of the complaint, "the estate of the plaintiff" during all of this time "was still outstanding and in existence." Upon this conception of liability, the plaintiff's complaint has been framed, and the common law notion of an *assumpsit* for money had and received to the plaintiff's use is thereby invoked, as the legal theory upon which the validity of the complaint must be determined.

That there was no conventual surrender of the demised premises is manifest from the attitude of the parties, and the inaction of the defendant; that there was no constructive surrender by operation of law is equally manifest, when it is recalled that such a surrender can be evolved from the acts of the parties only when the intent to accept a proffered surrender is made reasonably clear and unequivocal, or is the logical and necessary result of the landlord's conduct. *Meeker v. Spaulsberry*, 66 N. J. L. 60; *Payne v. Hall*, 82 *Id.* 362; *Smith v. Hunt*, 32 R. I. 326; 25 *Am. Cas.* 971; *Dennis v. Miller*, 68 N. J. L. 320; *Jones v. Rushmore*, 67 *Id.* 157.

That the element of privity of estate which enters into the completed legal relationship of landlord and tenant, was divested by the plaintiff's conduct in "ceasing to occupy," or, in the language of the trial court, "abandoning" the premises, becomes manifest. *Hunt v. Gardner*, 39 N. J. L. 530; *Ghegan v. Young*, 23 Pa. St. 18; 2 *Bour.* 758; 24 *Cyc.* 877.

The second paragraph of the complaint alleges that the plaintiff "having no further use for said premises so notified the defendant," and the third paragraph alleges that "the plaintiff ceased to occupy said premises and tendered to the defendant a surrender of his estate therein."

The failure of the defendant to accept the plaintiff's offer is of importance only upon the inquiry whether there was in fact a conventual surrender, or one implied by operation of

Whitecomb v. Brant.

90 N. J. L.

law; but upon the question of abandonment, these allegations of the complaint are material as an admission evidencing the plaintiff's own mind and individual status, with regard to the *locus in quo*; and we conceive that these admissions establish the plaintiff's status as a tenant, who had abandoned the demised premises, without the consent of the landlord, thereby severing the common law relationship of privity of estate, without terminating the privity of contract which still imposed upon the plaintiff the obligation to pay rent under the covenant in the lease. *Hunt v. Gardner, supra*; *Creveling v. DeHart*, 54 N. J. L. 338; 24 Cyc. 1164, and cases cited.

In this situation the landlord had a legal right to enter under the privilege accorded him by the express terms of the lease; or under his common law right as landlord for the protection of the demised premises. Upon this principle a landlord is not upon the abandonment of the demised premises required to relet for the protection of the tenant.

Where the landlord enters under a provision in the lease, such as is here presented, the liability to pay rent as such is based upon the terms of the covenant, and does not arise out of the privity of estate incident to the relationship of landlord and tenant, which is thereby terminated. *Hunt v. Gardner, supra*; *Teller v. Boyle*, 132 Pa. St. 56; 18 Atl. Rep. 1069; *Vogel v. Piper*, 89 N. Y. Supp. 431; 24 Cyc. 1165.

We have, therefore, the situation of a tenant who has violated his covenant by abandoning the demised premises, and failing to pay rent, upon which after an interim of two months, the landlord entered and relet the premises, and is thereupon met by a demand from the tenant for the increased monthly installment of rent which the new letting yields, during the term of the former lease.

This demand, confessedly, cannot rest upon contract, because none exists, unless one can be implied, as the plaintiff conceives, upon the doctrine underlying the common law action of *assumpsit* for money had and received. But quite manifestly that doctrine was based upon an equitable consideration, superimposed upon a pure legal or moral duty, as where money had been paid under mistake or duress, or where a con-

sideration had failed, from which equitable consideration the law *ex debito justitiæ* raised an implied promise, and, in the absence of a suitable original writ, conceded an action on the case as a remedy. *Bonnell v. Foulke*, 2 Sid. 4; 2 Harv. L. Rev. 66; 2 R. C. L. 746, and cases; 3 *Streets Found. Leg. Liab.* 190; 5 C. J. 1381, and cases.

Lord Mansfield, in *Moses v. Macferlan*, 2 Burr. 1005, concisely defined its nature as a "kind of equitable action, to recover back money, which ought not in justice to be kept. * * * It lies only for money which, *ex æquo et bono*, the defendant ought to refund. * * * In one word, the gist of this kind of action, is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

It is manifestly inconceivable that a right of action, based as was this, in its inception upon the construction of a legal fiction to support it, could be made applicable to any claim excepting one arising *in fore conscientiæ*; for, as Blackstone says, "No fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience which might result from the general rule of law." 3 *Bl. Com.* 43.

In *Lloyd v. Hough*, 1 How. (U. S.) 153, Mr. Justice Daniel observed: "The very term *assumpsit* presupposes a contract. Whatever, then, excludes all idea of a contract, excludes, at the same time, a remedy which can spring from contract only."

The development of modern contract law has evolved from these fundamental principles a distinct department of jurisprudence under the designation of "*quasi-contracts*," to the elucidation of which the learned efforts of an eminent legal tutor has given deserved prominence.

It is therein observed that "the real reason why a plaintiff who is in default under a contract cannot recover money paid thereunder, is that it is because of his default that he has not received from the defendant the subject-matter of the contract." *Law of Quasi Cont.* (Prof. Keener) 230.

Whitcomb v. Brant.

90 N. J. L.

The Massachusetts Supreme Court, in *Stark v. Lincoln*, 2 Pick. 267, elucidates the general principle with these observations: "Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek, through their instrumentality, impunity or excuse for the violation of them. And it is no less repugnant to the well-established rules of civil jurisprudence, than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it."

The same doctrine was applied in *Haslack v. Mayers*, 26 N. J. L. 284; *Fry v. Miles*, 71 Id. 293; *West Shore Railroad v. Wenner*, 75 Id. 494, and in New York in *Peoples Bank v. Mitchell*, 73 N. Y. 406.

Volenti non fit injuria supplies the basic maxim upon which this superstructure of the law has been constructed, as it does in the ordinary delictual actions where the conduct of the actor presents a complete answer to the suit as an estoppel *in pais*.

Its application results in denying a remedy to one whose voluntary conduct, tantamount to a consent, has resulted in his own loss or injury.

It is "a general rule of the English law," says Lord Tindall in *Gould v. Oliver*, 4 B. N. C. 134, "that no one can maintain an action for a wrong, where he has consented to or contributed to the act which occasions his loss."

The same principle was applied in *Byam v. Bullard*, 1 Curt. (U. S.) 101, and in *Caswell v. Worth*, 5 E. & B. 849.

Remembering that the action of *assumpsit* had its origin in a conception of tort liability, primarily based upon the element of deceit, by which one attempted to enrich himself at the expense of another (2 Harv. L. Rev. 64) from which *ex debito justitiæ* an implied promise was evolved, the propriety of the applicability of the maxim in this instance becomes apparent; and its application becomes conspicuously apparent, when it is recalled that so far as the plaintiff could do so, he

90 N. J. L.

Whitcomb v. Brant,

endeavored by act and word to surrender and evade every semblance of his contractual obligation; and in fact abandoned the *locus in quo*, for the purpose of being relieved from all responsibilities and obligations under his covenant.

The conduct of the defendant in acting as he did upon this declared abandonment, incidentally resulted in having the rent received, applied *pro tanto* to benefit the plaintiff, and to relieve him to that extent under the obligation of the covenant.

To that extent the doctrine of *assumpsit* which he invokes indemnified him and finds recognition in the adjudications. *Alsop v. Banks*, 13 L. R. A. 598, and notes.

In so far as the plaintiff's rights under the contract are concerned, they were at an end, so far as he could produce that result, when he abandoned the premises and defaulted in the performance of his covenants.

His privity of estate was terminated by his own act, so that no implied promise can be said *ex debito justitiæ* to arise from its existence. To concede to him, therefore, a right constructed by a fiction of law, for the purpose of subserving the ends of justice, is tantamount to conceding that a contractual right of action may be implied by law in favor of one who by the voluntary violation of his covenant, produces a status of non-feasance and default, from which acts of deliction he seeks to reap a benefit and extract a reward; an anomaly, as we have seen, which can find no support in legal principle.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

Bonfield v. Blackmore.

90 N. J. L.

ORAVIA M. BONFIELD, RESPONDENT, v. J. EDWARD
BLACKMORE, APPELLANT.

Argued December 1, 1916—Decided March 5, 1917.

1. The liability of an inviter is circumscribed by the invitation, and does not extend to persons invited whose injuries are received while using the premises without the limits of the invitation.
2. A mere passive acquiescence by the owner of a building, or his representative, in a certain use of his property, imposes no obligation upon him to keep it in a safe condition for the benefit of the user.

On appeal from the Supreme Court.

For the appellant, *M. Casewell Heine*.

For the respondent, *Wilbur A. Heisley*.

The opinion of the court was delivered by

KALISCH, J. The appellant appeals from a judgment on a verdict rendered against him in favor of the respondent, in the Essex Circuit, for injuries sustained by the latter, as a result from falling down an elevator shaft in the appellant's store. The facts are briefly these:

The appellant at the time of the accident was the owner of a six-story building with basement at No. 60 Academy street, in the city of Newark.

The entrance to the building was through a small tiled vestibule from which a stairway led to the upper floors. To the right, at the threshold of this vestibule, was a door leading into the appellant's photo and art supply store, and to the left was a show case, displaying photographs, of a tenant named Bergman, who occupied and used the fifth floor, as a photo finishing studio.

About midway of the appellant's store, in the side wall, was a door which opened directly upon a freight elevator shaft. The door opened and shut on a slide. When opened it would

90 N. J. L.Bonfield v. Blackmore.

permit entrance upon the elevator, if there, and if the elevator was not there, then upon a dark open shaftway. This elevator was used, by appellant as well as by Bergman, who was the only other tenant, to carry merchandise, employes and sometimes visitors or customers to the various floors of the building. The use to which Bergman put the elevator was known to appellant who made no objection. The appellant provided no one to run the elevator, and when he had need of it, one of his employes would operate it. The respondent, who had never been in the building before, while on his way there and near the entrance thereto, was accosted by Bergman's employe, a boy fourteen years of age, who was just coming out of the building and was asked who the respondent wanted to see, and when told that it was the photographer, the boy replied: "Follow me, and I will take you up on the elevator." The respondent followed the boy into the appellant's store and to the place where the freight elevator was located. The boy opened the sliding door, stepped aside to let the respondent enter, and no elevator being there at the time, the respondent stepped into open space and fell to the basement.

At the close of the plaintiff's case, in the court below, counsel for appellant unsuccessfully moved for a nonsuit, and at the close of the entire case unsuccessfully moved for a direction of a verdict for the defendant below, upon grounds which present the broad question here, whether the facts, as established, afforded any legal basis for a recovery by the plaintiff below. Counsel for respondent urges that the judgment under review can be properly sustained upon the theory that the appellant being a storekeeper necessarily was an inviter to the public to enter his premises, and, therefore, under a legal duty of guarding the elevator and opening in a reasonable manner to protect persons who enter as prospective customers, regardless whether they in fact became purchasers or not. The facts show that the respondent did not enter the appellant's store for the purpose of becoming a purchaser, but for the purpose of visiting a tenant on the fifth floor. But even if it were assumed that the respondent entered the appellant's store for the purchase of articles in the line of the appellant's business,

Bonfield v. Blackmore.

90 N. J. L.

the legal duty of the inviter to use reasonable care to protect the invitee from dangers existing on the premises and unknown to the invitee was no broader than the implied invitation—that is, to the use of the store space.

It is well settled that the liability of an inviter is circumscribed by the invitation and does not extend to persons invited whose injuries are received while using the premises not within the limits of the invitation. *Ryerson v. Bathgate*, 67 N. J. L. 337. Evidently, to meet this legal situation, it is further urged by counsel for respondent that since there was proof that the appellant had knowledge that the elevator was being used by the tenant Bergman in carrying visitors and customers to the studio and made no objection, that that was tantamount to an acquiescence by the respondent in the use of the elevator by the tenant for that purpose, and hence, persons who came through the appellant's store to take the elevator to go to Bergman's studio were impliedly invited to do so by the appellant.

But this court, in *Saunders v. Smith Realty Co.*, 84 N. J. L. 276, held that a mere passive acquiescence by the owner of a building, or his representative in a certain use of his property, imposes no obligation upon him to keep it in a safe condition for the benefit of the user.

The lease, from the appellant to Bergman, which was offered in evidence, contains no clause authorizing Bergman to use the elevator.

It cannot, properly, be said in the present case that the appellant did not use reasonable care in keeping his store to which the public was generally invited in a reasonably safe condition.

When the respondent with Bergman's servant entered the appellant's store the door leading to the elevator was shut. It was the act of Bergman's servant in opening the door when the elevator was not there that created a danger, and it was at the invitation of Bergman's servant that the respondent stepped into the vacant space which resulted in his injury.

Manifestly, these circumstances in themselves preclude any liability for the accident attaching to the appellant.

The judgment will be reversed.

90 N. J. L.Caruso v. Montclair.

For affirmance—BLACK, J. 1.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

NICOLA CARUSO AND GUISEPPI CARUSO, APPELLANTS, v.
TOWN OF MONTCLAIR, RESPONDENT.

Submitted July 10, 1916—Decided March 5, 1917.

The right of a municipality to contract with a railroad company for an alteration of street grades to change a grade crossing, under the provisions of section 30 of the General Railroad law (*Comp. Stat.*, p. 4234), is paramount to the provisions of the Road act of 1858 (*Comp. Stat.*, p. 4461) and supersedes it; and in cases where a change of grade in a street is made by a municipality thereunder, the consent of a majority of owners in interest, fronting on the street, is not required. Therefore, where the municipality proceeds under section 30 of the General Railroad law, to change the grade of a street, sections 70 and 73 of the Road act are not applicable, and any damage sustained by the landowners, by reason of such change, must be assessed as provided by the statute.

On appeal from the Supreme Court.

For the appellants, *Gaetano M. Belfatto* and *Wilbur A. Heisley*.

For the respondent, *Hartshorne, Linsley & Leake*.

The opinion of the court was delivered by

KALISCH, J. The precise question presented for decision on this appeal is whether an owner of a lot in a street built upon can properly maintain an action for damages sustained by him against a municipality, for a change made in the grade of the street, where it appears that the consent of a majority

Caruso v. Montclair.90 N. J. L.

of the owners, in interest, of the lots fronting on the part of the street altered had not been obtained, according to the requirement of section 73 of the Road act (*Comp. Stat.*, p. 4461), and where it further appears that such change was made, in order to eliminate a grade crossing, under the act of 1901, page 116. The facts are these:

The plaintiffs were the owners of a lot on Bay street, in the town of Montclair, upon which stood a three-story building. The tracks of the Delaware, Lackawanna and Western Railroad Company crossed Bay street at grade. In order to eliminate this crossing the town and railroad company made an agreement by which the town should by ordinance change the grade of the street. This was done, and as a result the street was depressed, in front of the plaintiffs' property, the entire width thereof, to a depth of about fifteen feet. The plaintiffs were awarded damages by the assessors who were authorized to make the award. Plaintiffs refused to accept the award and brought an action for damages against the town. The trial judge directed a nonsuit, and it is from that judgment that the plaintiffs appeal.

Section 70 of the Road act (*Comp. Stat.*, p. 4461) gives an action to the landowner injured by any change of grade, if brought within twelve months. Section 73 of the same act provides that no change of grade shall be made in a street built upon, without the consent of the majority of the owners, in interest, of the lots fronting on the part of the street altered, nor without paying damages. These two sections make provision for an action for change of grade if brought within twelve months, and make a change of grade where the street has been built on unlawful without the consent of the majority.

Section 72 provides that section 70 shall not apply where the charter of the municipality authorizes an assessment for damages, and, as the respondent had that power, this action cannot be sustained if the change of grade was lawfully made.

The contention of counsel for appellants is, that since it appears that the change was made without the consent of the majority of the owners, as required by section 73, the town

90 N. J. L.

Caruso v. Montclair.

was without power to lawfully order it to be done, and being unlawful it could not properly make any assessment, and hence, the appellants' remedy is an action against the town to recover damages for the unlawful injury sustained by them. This contention leaves wholly out of consideration an essential factor necessary to be considered in order to arrive at a proper solution of the question presented, and that is, as to the legal effect of the act of 1901 (*Pamph. L.*, p. 116), on the several provisions of the Road act, relied upon by the appellants.

The act of 1901, amended in 1903, is section 30 of the Railroad and Canal act (4 *Comp. Stat.*, p. 4234), is of like character as the act of March 19th, 1874, relating to railroads and canals (*Rev.*, p. 944, § 163), the legal effect of which latter act upon the section of the Road act was dealt with in *Reed v. Camden*, 53 N. J. L. 322, 328, in a well-considered opinion by Mr. Justice Scudder, who, speaking for the Supreme Court, held that the right to contract for change of grade at railroad crossings is paramount to the Road act of 1858 and supersedes it, and in such cases the consent of landowners is not required.

Therefore, where the municipality proceeds under the act of 1901, as amended, to change the grade, the sections of the Road act invoked by the appellants are not applicable, and any damages sustained by the landowners by the change must be assessed as provided by the statute.

The judgment of nonsuit will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

VOL. XC.

17

SAMUEL MARTIN, WHO SUES TO THE USE OF STANDARD
FIRE INSURANCE COMPANY, RESPONDENT, v. LEHIGH
VALLEY RAILROAD COMPANY OF NEW JERSEY, AP-
PELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

1. The owner of a house, which was set on fire by sparks emitted from a locomotive engine of the defendant company, received a sum of money, from an insurance company, giving the latter a subrogation receipt. He then brought an action against the railroad company for the entire loss, which was settled by payment of the total loss, less a certain sum, fixed as the amount paid by the insurance company. The insurance company subsequently brought an action against the railroad company to recover the amount paid by it upon the insurance policy, and the railroad company asked for a nonsuit, because it appeared that another action had been begun and determined for the same loss. *Held*, that the former action and settlement thereof was not a bar to the action by the insurance company.
2. The statute limiting the time within which an action for damages for fire occasioned by sparks from a locomotive engine shall be brought, does not require the prosecution of the action to be brought to a finality within the statutory period fixed for the bringing of the suit.
3. Where, at the trial of an action against a railroad company for damages occasioned by the emission of sparks from a locomotive, there was testimony adduced by the defendant company, that the spark arrester of the locomotive which caused the fire was inspected, and found in good order, and there was also testimony that the same engine had set another fire, and an expert further testified that where fires repeatedly occur through sparks escaping from an engine, it is evidence that the engine is not in proper order, the question of negligence of the defendant company was properly submitted to the jury.

On appeal from the Supreme Court.

For the appellant, *Adrian Lyon*.

For the respondent, *Huston Dixon*.

The opinion of the court was delivered by

KALISCH, J. The action in the court below was brought against the Lehigh Valley Railroad Company for the use of

90 N. J. L.Martin v. Lehigh Valley R. R. Co.

the Standard Fire Insurance Company, and arose out of the following circumstances:

Martin's house was burned by a fire originally started by sparks or live coal emitted from a locomotive engine of the defendant company. He had a policy of insurance on the house in the Standard Fire Insurance Company, which company paid him upon that policy \$1,089, and for which he gave a subrogation receipt to the company. He then brought his action against the railroad company to recover his entire loss, but it appears that this action was compromised between the parties, by the railroad company paying the amount of the total loss, less the sum received by Martin from the insurance company, which was fixed at \$1,500.

The insurance company then endeavored to collect from the railroad company the amount which it had paid Martin on the policy of insurance, and upon a refusal of the railroad company to recognize this claim, the action in the court below was brought and resulted in a verdict and judgment against the railroad company. From this judgment the railroad company appeals to this court.

The first ground of appeal is based upon the claim that the trial judge erred in refusing to nonsuit the plaintiff below, because it appeared that another action had been commenced and determined for the same loss. This manifestly refers to the action brought by Martin against the railroad company to recover the whole amount of the loss, and which was compromised by the railroad company paying Martin \$1,500, after deducting the amount received by him from the insurance company. That action was obviously settled upon the basis of the liability over by the railroad company to the insurance company, and, therefore, afforded no legal bar to the latter maintaining its action against the railroad company.

The next ground of appeal is based upon the assertion, by counsel for appellant, that more than a year elapsed before the action was begun. But this is not so in fact. The fire occurred on the 2d day of May, 1913, and the action was begun by the issuance of the summons on the 30th day of December of that year and the filing of the complaint on the 8th day of the next succeeding month.

The argument of counsel for appellant further proceeds upon the theory that the language of section 58 of the Railroad act (*Comp. Stat.*, p. 4246), creating the special limitation of actions of this nature, requiring that they "shall be commenced and sued within one year after the cause of action has accrued and not after," limits not only the bringing of the action within the year, but also the prosecution thereof to a finality, unless good cause for delay is shown. But, clearly, the statute does not mean that. It is well to note here that the Limitation act above referred to was amended by a later statute which enlarged the limitation of one year to two years. *Pamph. L.* 1912, p. 265. But this is of no importance here.

Moreover, the statute of limitation is a defence which must be pleaded and no such defence is set up in the defendant's answer.

The only other ground urged for a reversal is that there was no negligence shown on the part of the appellant company as a producing cause of the fire. We think that there was evidence on this point requiring the submission of the question involved to the jury. It is true that there was proof of the examination of the spark arrester of the engine which caused the fire and that the inspector testified to its good order. But there was also evidence that this same engine had set another fire, and only two days before the one in question, and there was also testimony emanating from an expert called by the railroad company that where fires repeatedly occur through sparks escaping from an engine, it is good evidence that the engine is not in proper order.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

90 N. J. L.State v. Hart.

THE STATE OF NEW JERSEY, PLAINTIFF IN ERROR, v.
FREDERICK HART, DEFENDANT IN ERROR.

Argued June 21, 1916—Decided June 18, 1917.

1. At common law, a bill of exceptions was not allowable in a criminal case. Error was assignable only upon the record.
2. The right of review for trial errors, on bills of exceptions, in criminal cases, is given by the statute of this state, solely to the defendant.
3. A writ of error will not lie in favor of the state, to review a judgment of acquittal.
4. Where an acquittal is had in a court of competent jurisdiction, having jurisdiction of the person and the crime with which he is charged, it is an acquittal within the meaning of the provisions of article 1, paragraph 10, of the state constitution, even though such acquittal was the product of trial errors.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 48.

For the plaintiff in error, *Martin P. Devlin*.

For the defendant in error, *William J. Crossley*.

The opinion of the court was delivered by

KALISCH, J. The defendant in error was indicted for seduction. On his trial, in the Quarter Sessions Court of Mercer county, the trial judge directed the jury to acquit him. The state sued out a writ of error in the Supreme Court to the Court of Quarter Sessions, which writ was dismissed by the Supreme Court upon the ground that in order for the state to secure a review of a trial error, it must be able to have a bill of exceptions and a writ of error based thereon to remove the case to that court, and since the statute makes no such provision, and there being no such practice at common law as a writ of error in favor of the crown after an acquittal on the merits, the writ was improperly sued out.

State v. Hart.

90 N. J. L.

The state now brings the record up for review before us on a writ of error sued out of this court to the Supreme Court.

At common law a bill of exceptions was not allowable in a criminal case. Error was assignable only upon the record.

The bill of exceptions had its origin in the statute *Westm. 2; 13 Edw. I., c. 31.*

Tidd, in volume 2 on *Practice*, page 862, in commenting on this statute, says: "This statute extends to *inferior* courts; and to trials at bar, as well as those at *nisi prius*; but it has been doubted whether the statute extends to criminal cases."

In *King v. Archbishop of York*, *Willes Rep.* 533, Lord Chief Justice Willes, in discussing the scope of chapter 31 (on p. 535), says: "My brother Abney cited 2 *Inst.* 424, and *Savile 2*, where it was holden that the statute of *Westm. 2, c. 30*, concerning *nisi prius* does not extend to the king; and that although the act is general, yet a *nisi prius* cannot be granted where the king is a party, or where the matter toucheth the right of the king, without a special warrant from the king or the consent of the attorney-general. He said, likewise, that *c. 31* of the same act, concerning bills of exceptions, was never thought to extend to the crown. And he mentioned some cases where such pleas had been denied; and said that he thought that the *stat. 9 An. c. 20*, extending this statute to writs of *mandamus &c.* rather strengthened the objection."

In 2 *Inst.* 427, Lord Coke says: "This act doth extend as well to the demandant or plaintiff as to the tenant or defendant in all actions, real, personal or mixed." And in *King v. The Inhabitants of Preston*, *Rep. temp. Hardw.* 249, Lord Hardwicke (on p. 251), on an information in the Court of Exchequer, said that when he was attorney-general he had known a bill of exceptions allowed, but then, said his Lordship, "they are properly civil suits for the king's debt," &c. But a bill of exception cannot be allowed by the justices of peace at the Quarter Sessions on the hearing of an appeal against an order of removal.

In the case of *Sir Henry Vane*, 1 *Lev.* 68; *Kel.* 15; *Sid.* 85, who was tried for high treason, the court refused to seal

90 N. J. L.

State v. Hart.

a bill of exceptions, because they said criminal cases were not within the statute, but only actions between party and party. This matter is fully discussed in a learned and exhaustive note by Mr. Evans in volume 3 of *Evan's Statutes*, page 341, &c., edition of 1829. On p. 342, the learned commentator says: "From the language of the statute itself, I certainly should not infer its application to criminal cases. * * * The general feeling of the profession upon the subject is most strongly evinced by the fact of no such bill of exceptions having been tendered for a very long period of time, although many important questions of criminal law have been discussed with great warmth, and with strong feelings of opposition to the opinions of the court of which the much-agitated question of the functions of the jury in cases of libel previous to the statute of George III., is perhaps the most prominent instance."

Chitty, in volume 1 of his excellent treatise on *Criminal Law* (*622), says: "When an exception is made by any party to a witness which is overruled by the court, the opposite side, have, at least in civil proceedings, the power of appealing from his decision, by tendering a bill of exceptions. This document the judge must, in civil cases, seal by virtue of 13 *Edw. I.*, c. 31, and it will operate like a writ of error. But it seems to be the better opinion that this provision does not extend to any criminal case; and is certainly inadmissible on indictments for treason and felony. It has indeed been allowed on an indictment for a misdemeanor, but the propriety of this allowance has been disputed."

In *Alleyne's Case*, *Dears. Cr. Cas. Res.* 505 (1852-1856), Lord Campbell, C. J. (on p. 509), says: "A bill of exceptions could not lie for the statute of *Westm.* 2 is confined to civil cases."

Under the ancient English practice trial errors in criminal cases were reviewable by the taking of a special verdict or by a case reserved which is illustrated by the following instances:

In *King v. Hodgson et al.*, 1 *Leach Cr. Cas.* 6, a case decided in 1730, there was a special verdict upon an indictment against several defendants, jointly indicted, tried and con-

State v. Hart.

90 N. J. L.

victed. The question was whether under the evidence they were all equally guilty. The report of the case states: "In order to avoid the expense which attends the drawing and arguing a special verdict, the counsel agreed to submit the point to the consideration of the judges in the shape of a reserved case."

In *Reg. v. Bernard*, 1 *F. & F. Cr. Cas.* 240, 253, the defendant's attorney submitted seven legal questions to the trial court to be reserved, the seventh of which was concerning a certain letter which was claimed to have been improperly received in evidence, upon which Lord Campbell, C. J., sitting with Pollock, C. B. Erle, J., and Crowder, J., and a jury, remarked: "There appears to be no objection to reserving any of those points except the seventh; but that point, as you must be aware, was argued before us, and we were unanimously of the opinion that the letter was admissible. All other points which you have raised are very fit indeed for the consideration of the fifteen judges."

And so it was held by the courts of the State of New York prior to the passage of a statute providing for bills of exceptions in criminal cases, that no bill of exceptions could be taken in a criminal case. *People v. Holbrook*, 13 *Johns. Rep.* 90; *People v. Vermilyea*, 7 *Cow.* 108; *Ex parte Barker*, *Id.* 143.

A consideration of the history of the origin and development of bills of exceptions in this state is highly important as bearing upon the question as to what the common law was on the subject prior to the constitution of 1776.

The first act relating to bills of exceptions was passed in 1797, and is to be found in *Pat. L.*, p. 245, entitled "An act directing bills of exceptions to be sealed" This act though somewhat narrower in its terms than the English Parent act of *Westm. 2.* in that the New Jersey statute confines its operation to causes where a writ of error lies to a higher court, whereas the English statute is general in that regard. In all other respects, however, the act of 1797 is, in substance, a copy of the earlier English statute.

90 N. J. L.State v. Hart.

An examination of the early reports of criminal cases in this state shows an absence of bills of exceptions in such cases, until 1849, when, in *West v. State*, 22 N. J. L. 212, for the first time, manifestly, in a criminal case under review, with a return of the record came a bill of exceptions, which the reporter says was signed by virtue of the act of 1848.

Looking into the practice which prevailed in criminal cases in this state prior to the passage of the act of 1848, we find that it was analogous to the practice which prevailed in England before the Revolution of 1776, so far as it was consonant with our changed form of government. The practice was for the trial judge or court to take a special verdict, reserving the questions of law for the opinion of the judges, or to certify a stated case, asking for an advisory opinion. See *State v. Guild*, 10 N. J. L. 175.

That the consensus of opinion of both bench and bar of this state was that the act of 1797 did not provide for bills of exceptions in criminal cases is not only confirmed by the practice above alluded to, but also by the statute of 1848 (*Pamph. L.*, p. 226) entitled "An act directing bills of exceptions to be sealed in certain criminal cases."

Section 1 of this act declares "that the act entitled 'An act directing bills of exceptions to be sealed,' passed March 7th, 1797, and each and every of the provisions thereof shall be taken, deemed, and adjudged to extend to trials of indictment for crimes and misdemeanors, which by law are punishable by imprisonment at hard labor."

Section 2 of the act provides for the taking of an exception on the trial of an indictment for any crime or misdemeanor included within the provisions of the first section of the act, and for the return of the bills of exceptions with a writ of error.

In 1855 the legislature by an act entitled "A supplement to an act, approved April the sixteenth, 1846, and entitled 'An act regulating proceedings and trials in criminal cases,'" declared that the act passed in 1797 shall be taken, deemed and adjudged to extend to trials of indictment for treason, murder or other crimes punishable with death, misprision of treason,

State v. Hart.

90 N. J. L.

manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury and subornation of perjury, and in express terms repealed the act of 1848. *Pamph. L.* 1855, p. 648.

It is obvious that the effect of this declaration of the legislature, and the repeal of the act of 1848, precluded the taking of bills of exceptions in cases of misdemeanor and not mentioned in the above category of crimes.

In 1863 the legislature, after declaring that the act of 1797 shall apply to criminal cases, extended the right to a bill of exceptions on the trial of any indictment for any crime or misdemeanor. *Pamph. L.* 1863, p. 311; *Nir. Dig.*, p. 228, §§ 49, 50.

By section 90 of the Criminal Practice act of the Revision of 1877, page 284, it is provided that sections 242, 243, 244, 245 and 246 of the act entitled "An act to regulate the practice of courts of law," shall be deemed, taken and adjudged to extend to trials of indictment for crimes and misdemeanors which by law are punishable by imprisonment at hard labor. This, obviously, left all cases of misdemeanor punishable by fine only or by imprisonment only, or by fine and imprisonment, without the benefit of bills of exceptions. But, by a later statute found in the Revision of 1877, page 1298, section 90 of the Criminal Practice act was repealed, and section 91 of the same act was amended with the result that bills of exceptions for trial errors are allowable "on the trial of any indictment in any court of this state, for any crime or misdemeanor."

It is to be noted that the right of review for trial errors, on bills of exceptions, in criminal cases, is given by the statute of this state, solely to the defendant.

These statutes were enacted after the adoption of the constitution of 1844. They essentially broadened the operation of a writ of error in favor of a person convicted of crime.

In view of the constitutional provision (article 1, paragraph 10) that no person shall, after an acquittal, be tried for the same offence, it is clear that it is not within the constitutional power of legislative authority to confer by statute any such right on the state.

It is no answer to the prosecutor's claim to the right to review a trial error to say that because the crown at common law was not entitled to a bill of exceptions, in a criminal case, therefore, no writ of error would lie in its behalf. For it has already been sufficiently pointed out that bills of exceptions, in criminal cases, were unknown to the common law, and to the criminal procedure of this state until the statute of 1848. But, as to the right of the crown to a writ of error, at common law, for a trial error, in a criminal case, there seems to be some diversity of opinion. It is the consensus of judicial opinion that the sole function of a writ of error at common law was to bring up for review errors appearing on the face of the record. In *Rex v. Wilkes*, 4 Burr. 2527, 2550, Lord Mansfield, *inter alia*, said: "Till the 3rd of Queen Ann, a writ of error in any criminal case was held to be merely *ex gratia*." * * * "But in the 3rd of Queen Ann, ten judges were of the opinion 'that in all cases under treason and felony, a writ of error was not merely of grace, but ought to be granted.'" "It cannot issue now, without a fiat from the attorney-general; who always examines whether it be sought merely for delay, or upon a probable error. * * * In a *misdemeanor*, if there be probable cause, it ought not to be denied; this court would order the attorney-general to grant his fiat. But be the error ever so manifest in treason or felony, the king's pleasure to deny the writ is conclusive."

The head-note to the case *Re Pigott*, decided in 1868 (11 Cox Cr. Cas. 311), reads: "The granting of a writ of error is part of the prerogative of the crown. If, therefore, the attorney-general of England, or the Lord Lieutenant of Ireland refuse to grant it, the Lord Chancellor has no jurisdiction to review that decision."

Bishop, in the second edition of his valuable treatise on *Criminal Procedure*, volume 1, section 1191, in commenting on the English practice relating to the writ of error, says: "It never was granted except when the king, from justice when there really was error, or from favor where there was no error, was willing the judgment should be reversed. After writ of error granted, the attorney-general never made any

opposition because either he had certified there was error and then he could not argue against his own certificate; or the crown meant to show favor, and then he had orders not to oppose. The king, who alone was concerned as prosecutor, and who had the absolute power of pardon, having thus expressed his willingness that the judgment should be reversed, the Court of King's Bench reversed it upon very slight and trivial objections, which could not have prevailed if any opposition had been made, or if the precedent had been of any consequence."

But enough has been said to demonstrate that a writ of error, even in a case of misdemeanor, did not, under the English practice, issue, as a matter of course, upon the application of a convicted defendant, and that the writ was resorted to by the crown to show favor to the convicted person and to bring about a reversal of the judgment against him. Singularly enough it does not appear that the writ was ever used by the attorney-general to reverse a judgment of acquittal, until the cases of *Regina v. Mills*, 10 Cl. & F. 534, decided in 1843; *Regina v. Chadwick*, 11 Q. B. 205, decided in 1846, and *Regina v. Houston*, 2 Craw. & Dix. 191, the latter case being a judgment on demurrer in favor of the defendant. In none of these cases was the question raised as to the right of the attorney-general to take the writ. And because of this situation, counsel for the state argues that it must be accepted as a fact that the right of the crown to take the writ in case of an acquittal is indisputable.

To a similar contention of counsel made in *People v. Corning*, 2 N. Y. 9, dealing with the precise question under discussion, the Court of Appeals, through Mr. Justice Bronson (on p. 17), said: "The weight of authority seems to be against the right of the government to bring error in a criminal case. The absence of any precedent for it, either here or in England, within a very recent period, fully counterbalances, if it does not outweigh the fact, that the right has lately been exercised in a few instances without objection. And in three or four states, where the question has been made, the courts have decided that the right does not exist."

90 N. J. L.State v. Hart.

But even if it be assumed that it was the practice in England for the attorney-general to take a writ of error in a criminal case, where the defendant was acquitted, we must not overlook the fact that this power so exercised sprung from a governmental policy to carry out the royal prerogative of the king and was either to favor or oppress a subject. Such a policy could not, consistently, with our free form of government have become imbedded in the administration of law in this state. And while we recognize in full measure the functions of a writ of error as they existed at common law up to the time of the adoption of the constitution of 1776, the procedure relating thereto is of statutory regulation.

Whatever doubt may exist whether the king under the common law could have a writ of error in a criminal case after judgment of acquittal of the defendant, it has been, as declared in the opinion of the Supreme Court, the unquestioned practice in this state recognized and acquiesced in by bench and bar, that no such writ would lie in favor of the state, to review a judgment of acquittal.

Since the constitution declares that no person shall, after an acquittal, be tried for the same offence, no legislation can be constitutionally enacted giving the right of review in cases where there has been an acquittal.

Counsel for the state argues that the word "acquittal" in the constitution signifies legal acquittal, and that where it appears that a trial error has occurred which led to an acquittal, it cannot be properly said that there was an acquittal within the meaning of the constitutional sense of the word.

To adopt this view would lead to a nullification of the benefit of the constitutional provision. The obvious design of the framers of the constitution was to prevent oppression.

Where an acquittal is had in a court of competent jurisdiction, having jurisdiction of the person and the crime with which he is charged, it is an acquittal within the meaning of the constitutional provision, even though such acquittal was the product of trial errors.

In the case of *State v. Meyer*, 65 N. J. L. 233, the defendant was convicted in the Court of Quarter Sessions, and took

State v. Hart.90 N. J. L.

a writ of error to the Supreme Court, where the judgment of the Quarter Sessions was reversed. Thereupon the prosecutor of the pleas sued out a writ of error from this court to reverse the judgment of the Supreme Court, and the defendant moved to dismiss the writ on the ground that the state was not entitled to a writ of error in a criminal case. This court justified the propriety of the taking of the writ by the state, by virtue of an act of 1799, "that errors happening in the Supreme Court of this state shall be heard, rectified and determined by the Court of Appeals in the last resort in all cases of law."

It is to be observed that the defendant in that case was convicted in the court of first instance, and that it was an intermediate court, whose action was subject to review by this court, which reversed the judgment. This case, is, therefore, no authority for the proposition advanced by counsel for the state that a writ of error may be prosecuted by the state where an acquittal is the result of misdirection by the court.

For the reasons given, the judgment of the Supreme Court, dismissing the writ of error, is affirmed.

For affirmance — THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

90 N. J. L.Erie R. R. Co. v. Pub. Utility Board.

ERIE RAILROAD COMPANY, APPELLANT, v. BOARD OF
PUBLIC UTILITY COMMISSIONERS AND BOARD OF
CHOSEN FREEHOLDERS OF THE COUNTY OF HUD-
SON, RESPONDENTS.

Argued November 28, 1916—Decided March 5, 1917.

Under an act concerning public utilities (*Pamph. L.* 1911, p. 374, ch. 195, § 38) the Supreme Court is given jurisdiction to review the orders of the board of public utility commissioners and to set aside or affirm the orders *in toto*, but the Supreme Court has no power under said act, either to revise or modify an order of said board.

On appeal from the Supreme Court, whose opinion is reported in 87 N. J. L. 438.

For the appellant, *Collins & Corbin*.

For the board of public utility commissioners, *L. Edward Herrmann* and *Frank H. Sommer*.

For the board of chosen freeholders of the county of Hudson, *John A. Dennin*, *James J. Murphy* and *Joseph M. Noonan*.

The opinion of the court was delivered by

BLACK, J. This case is an appeal by the Erie Railroad Company from an order and judgment entered in the Supreme Court, reversing an order of the board of public utility commissioners, founded upon a petition filed by the board of chosen freeholders of Hudson county. The subject-matter of the order was the keeping on duty flagmen at certain grade crossings of the Newark branch of the appellant's railroad, in Hudson county. The facts are clearly and accurately stated in an opinion by Mr. Justice Kalisch, speaking for the Supreme Court, reported in 87 N. J. L. 438. The order of the Supreme Court on which the judgment was entered, in addi-

tion to setting aside the order of the board of public utility commissioners, dated June 9th, 1914, "further ordered that the record be remitted to said board of public utility commissioners so that said part of said order be modified by providing that the prosecutor be required to keep a flagman on duty at said crossings and each of them only during such hours of the day as trains and engines are operated over said crossings, and each of them, and covering the operations of all trains and engines over said crossings, and each of them." It is from the above order and judgment of the Supreme Court that an appeal has been made to this court, on the ground that the Supreme Court had no power to make such an order and judgment. The statute involved in this discussion is an act concerning public utilities (*Pamph. L. 1911, p. 374, ch. 195, § 38*), the pertinent part of which is: "The Supreme Court is hereby given jurisdiction to review said order of the board and to set aside such order when it clearly appears that there was no evidence before the board to support reasonably such order, or that the same was without the jurisdiction of the board." It requires no argument or illustration to demonstrate the point, that under this statute, the Supreme Court having concluded, there was no evidence to support a certain part of the order, the order of the board of public utility commissioners should have been set aside *in toto*, without directing or ordering the board of public utility commissioners to either revise or modify the order. What order should be made in lieu of the one set aside rests exclusively within the jurisdiction of the board of public utility commissioners.

We therefore conclude the judgment of the Supreme Court, for the above error should be set aside, because the Supreme Court had no power to make such an order or judgment under the statute. The power of the Supreme Court under the above statute must be limited either to affirm or to set aside the order of the board of public utility commissioners as a whole. The rule to be applied is illustrated in cases from our reports. *Public Service Gas Co. v. Board of Public Utility Commissioners*, 84 N. J. L. 463; 87 *Id.* 581; *Id.* 597.

90 N. J. L. Frank v. Bd. of Education of Jersey City.

The judgment of the Supreme Court is therefore reversed and the order of the board of public utility commissioners is set aside *in toto*.

For affirmance—WHITE, WILLIAMS, GARDNER, JJ. 3.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRI-
SON, TRENCHARD, BERGEN, MINTURN, BLACK, HEPPEN-
HEIMER, JJ. 8.

EUGENE FRANK, RESPONDENT, v. BOARD OF EDUCA-
TION OF JERSEY CITY, APPELLANT.

Submitted July 10, 1916—Decided March 5, 1917.

A municipal corporation may be liable for work done and materials furnished it, by an unauthorized agent, when the contract for such supplies is one that is within the scope of its corporate powers. An agency in such a case may, by implication, be created in fact, by the conduct or acts of the parties, and the contracts of such an agent may, by like conduct and acts of the parties, be, by implication, ratified by the municipality.

On appeal from the Supreme Court.

For the respondent, *Maximilian T. Rosenberg*.

For the appellant, *John Bentley*.

The opinion of the court was delivered by

BLACK, J. There is but a single question presented by the record in this case to be answered, viz., whether a municipal corporation is liable to pay for work done and materials furnished it, by an unauthorized agent, when the municipality had the power to make a contract for such purchases. If so, whether an agency to purchase such supplies in fact can be implied, from the acts and conduct of the parties and a ratifi-

Frank v. Bd. of Education of Jersey City. 90 N. J. L.

cation of the contract for such supplies be also implied, from like acts and conduct. The application of elemental and well-recognized principles in the law of agency, to the facts, as disclosed by the record in this case, leads us to answer these questions in the affirmative.

The case was tried at the Circuit, on an agreed statement of facts, resulting in a judgment against the board of education of Jersey City, for the sum of \$684.30, with interest, from June 1st, 1909. The suit was instituted to recover for work done and materials furnished as follows:

Nov. 4, 1908.	To installing light feeder conduit under sidewalk,	\$67.50
Dec. 9, 1908.	To installing power conduit under sidewalk,	67.50
Oct. 15, 1909.	To repairing damaged wiring in roadway....	40.00
Dec. 1, 1909.	To repairing motor generator	46.70
	To one pole tester.....	5.00
Dec. 28, 1909.	To installing power feeder conduit	228.80
	To installing light feeder conduit	228.80
		<hr/>
		\$684.30

The facts on which the ruling of the trial court was based are these: The above work and materials were actually furnished by the respondent to the appellant, by order of John T. Rowland, Jr., supervising architect of the appellant, except two items. He had been permitted by the appellant "for a number of years" to order labor and materials of the nature sued for in this case. His orders had been recognized by the appellant and the amounts therefor had been paid by it. "Many previous orders of the same kind were duly paid for by the defendant," furnished by the respondent. The item of \$46.70, for repairing motor generator, was for labor, which

90 N. J. L. Frank v. Bd. of Education of Jersey City.

was furnished by the respondent, to the appellant, by order of Charles C. Wilson, vice principal of the Jersey City high school, which was under appellant's control. All the items except the item of \$5 for one pole tester were "emergency" work, *i. e.*, they were furnished at the time the emergency existed, requiring immediate performance, and before a meeting of the appellant could be held, to pass upon the necessity of doing the same and ordering it to be done.

The respondent had done other work and furnished materials of a similar character for the appellant under and by similar orders. Such work had been regularly paid for, in due course, by the appellant, when the bills for the same were presented, without question as to the regularity of the requests, or the authority of the said Rowland and Wilson. The work done and materials furnished, sued for in this suit, were done and furnished, relying on the fact that previous orders by Rowland and Wilson, under similar circumstances, had been paid for by the appellant. The respondent knew that this practice existed and was permitted to exist by the appellant. This practice had been so "for a number of years." The appellant knew that the work and materials had been furnished it by the respondent, at or about the times they had been so furnished, and it did not, until three years after the last work had been performed, deny the authority of the said Rowland and Wilson to order the work and materials. The appellant has had the use and benefit of the work so done and materials furnished. The amounts charged are the usual amounts for such work and materials and are reasonable charges. The item of \$5 for one pole tester represents the loss or damage to a glass instrument, known as a pole tester, injured by the employes of the appellant. Wilson directed the respondent to present his bill therefor to the appellant, stating that it would be paid. Bills in due form of law, under oath, were presented by the respondent to the appellant before this suit was instituted.

It is quite clear the facts of this case substantially distinguish it from the cases decided by this court, *viz.*, *New Jersey Car Spring, &c., Co. v. Jersey City*, 64 N. J. L. 544, and *Jersey City Supply Co. v. Jersey City*, 71 *Id.* 631.

Frank v. Bd. of Education of Jersey City. 90 N. J. L.

In the first case, the suit was instituted to recover for three bills of goods furnished, viz., January 3d, 1894, \$270; June 30th, 1894, \$130.19; April 30th, 1895, \$280.05. The first bill, by a formal resolution of the street and water commissioners, dated April 2d, 1894, was ordered and directed to be paid. The court held the city was not liable for the last two bills, as the goods were requisitioned by subordinate officers, without authority from the board. The goods were not knowingly accepted or used by the board. That case did not involve the question of an express contract, nor the question of how an agency might be created.

In the second case, the requisition of the goods by the president of the board of fire commissioners was not previously authorized by the board, and approved or acquiesced in by the mayor, as provided by the statute. The agreed statement of facts sets forth in terms that the goods were "used by the city," and this expression furnished the chief support for the contention in the case that the municipal corporation was liable upon an implied undertaking to pay for them, but the court held there can be no implied contract in defiance of express restrictions imposed by law. In that case, the authorized agents were subject by law to restrictions, with respect to the subject-matter and to the form and method of contracting. They were limitations upon the power itself.

This case is differentiated from those cases by the facts in essential points. It is not simply a distinction without a difference. Those cases were rightly decided. They stand upon a firm legal foundation. The rule of law to be applied to this class of cases is stated by our Supreme Court thus: The rule of law is, that it is only when the corporation has the right to enter into the given contract that it can legalize it, after it has been performed under an authority of its unauthorized agents. *Cory v. Freeholders of Somerset*, 44 N. J. L. 445. That rule was subsequently applied by the Supreme Court, in the case of *Bourgeois v. Freeholders of Atlantic*, 82 Id. 82, to a recovery for the price of lumber sold and delivered to the county of Atlantic, for the reconstruction and repair of bridges. The contract for such lumber having been made by

90 N. J. L. Frank v. Bd. of Education of Jersey City.

an unauthorized agent, but was one which the corporation could lawfully make. It was also held that such a contract may be ratified by implication. This court, in the case of *New Jersey Car Spring, &c., Co. v. Jersey City, supra*, held such a contract can be expressly ratified by the municipal authorities. See, too, *Green v. City of Cape May*, 41 N. J. L. 45.

In the case under discussion, the School law of the state, session of 1903, found in *Pamph. L. 1904, p. 5, § 47; 4 Comp. Stat., p. 4740 et seq.*, provides that the board of education in a city school district such as Jersey City is vested with the power of making contracts in and by its corporate name, and by section 50 every such board shall have the supervision, control and management of the public schools and public school property in its district. It may appoint a superintendent of schools, a business manager and other officers, agents and employes as may be needed. Section 52 provides the board may at any time order repairs to school buildings to an amount not exceeding \$500, may authorize the purchase of supplies to an amount not exceeding \$250, without advertisement. Section 72 provides for a business manager, who shall supervise, if there be one, the construction and repair of all school buildings, and shall report monthly to the board of education the progress of the work; that repairs not exceeding the sum of \$100 may be ordered by the business manager, and repairs not exceeding the sum of \$500 may be ordered by the committee of the board having charge of the repair of school property, without the previous order of the board and without advertisement. In this statute, as will be seen, there is express authority for the appointment of an agent—a business manager. The term is immaterial. A supervising architect or vice principal might just as well be called an agent or business manager. There is also the recognition by the legislature of the fact that the board of education probably could not act in many cases without appointing such agents, since the very necessity of some cases requires that such a board should act through agents. But even this would not dispose of the two main items of \$228.80 each. There is

Frank v. Bd. of Education of Jersey City. 90 N. J. L.

no evidence tending to show, and it is not even pretended, that all these various items, amounting in the aggregate to \$684.30, can be treated as one contract, so as to bring the amount above the \$500 limitation permitted by the statute for repairs of school property without the previous order of the board and without advertisement. It would be quite impracticable to require either a formal resolution for every possible small expenditure, or for the board to act by a majority in person. In the state of facts these orders under consideration are called "emergency" orders. The dictionary definition of emergency is, a sudden or unexpected occurrence or condition calling for immediate action. 3 *Words & Phrases* 2361.

The literature of the law of agency is rich in adjudged cases. The principles pertinent to the subject under discussion are these: An agency, as between individuals or business corporations, may be implied from prior habit, or from a course of dealings of a similar nature between the parties. *Fifth Ward Savings Bank v. First National Bank*, 48 N. J. L. 513; *Gibson v. Snow Hardware Co.*, 94 Ala. 346; 2 *Corp. Jur.* 435, 441; 31 *Cyc.* 1217 (II); 1 *Mech. Ag.* (2d ed.), § 708. The agency may be implied from the recognition or acquiescence of the alleged principal, as to acts done in his behalf, by the alleged agent, especially if the agent has repeatedly been permitted to perform acts like the one in question. *Murphy v. Cane*, 82 N. J. L. 557; 2 *Corp. Jur.* 443, § 40. But when it is implied, and in so far as it is implied, the power of the agent must be determined from no one fact alone (*New Jersey Car Spring, &c., Co. v. Jersey City, supra*), but from all the facts and circumstances for which the principal is responsible. 2 *Corp. Jur.* 570, 576, § 218. So, ratification may be implied from any acts, words or conduct on the part of the principal, which reasonably tend to show an intention on the part of the principal to ratify the unauthorized acts or transactions of the alleged agent. *Strauss v. American Talcum Co.*, 63 N. J. L. 613; *Small v. Housman*, 208 N. Y. 115, 123, provided, the principal in doing the acts relied on as a ratification acted with knowledge of the material facts. *Metzger v. Huntington*, 139 Ind. 501, 520; 1 *Mech.*

90 N. J. L. Frank v. Bd. of Education of Jersey City.

Ag. (2d ed.), § 395. The rule is particularly applicable, where it appears that the principal has repeatedly recognized and affirmed similar acts by the agent. 2 *Corp. Jur.* 489, § 109; 31 *Cyc.* 1219. So, a municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the scope of the corporate powers, but not otherwise. *Dill. Mun. Corp.* (5th ed.), §§ 463, 797; 6 *McQuill. Mun. Corp.*, § 2656; *Green v. City of Cape May*, 41 N. J. L. 45; 28 *Cyc.* 675.

There can be no legal distinction in the method by which an agency may be created by implication, for an individual and a municipal corporation. In both cases they stand on the same footing. Thus, in *Dill. Mun. Corp.* (5th ed.), §§ 445, 775, it is stated: "In cases of public agents the public corporation, it is said, is not bound unless it manifestly appears that the agent is acting within the scope of his real and lawful authority, or he is held out by the authorized and proper officers or body of the municipality as having authority to do the act." The same rules apply to municipal corporations acting within the limits of the powers conferred upon them by the legislature as to other corporations or private persons. *Clark v. City of Washington*, 12 *Wheat.* 40; *Mayor, &c., of Jersey City v. Harrison*, 71 N. J. L. 69; *affirmed*, 72 *Id.* 185. The remark of Mr. Justice Collins, in the case of *Wentink v. Freeholders of Passaic*, 66 *Id.* 65, 67, is pertinent: "All that he (*i. e.*, the vendor or contractor) need look to is the power to make the ostensible contract." On this point, see *Armitage v. Essex Construction Co.*, 87 *Id.* 134; *affirmed*, 88 *Id.* 640; 28 *Cyc.* 667b, 675.

An implied agency is an actual agency. It is a fact to be proved by deductions or inferences from other facts. 2 *Corp. Jur.* 435, § 32; 444, § 42. This is quite different from agency by estoppel, as has been pointed out. Agency by estoppel should be restricted to cases in which the authority is not real but apparent. *Morris v. Joyce*, 63 N. J. Eq. 549, 555; *Blake v. Domestic Mfg. Co.*, 64 *Id.* 480, 494; *Pettinger v. Alpena Cedar Co.*, 175 *Mich.* 162, 166; *Columbia Mill Co. v. National Bank of Commerce*, 52 *Minn.* 224, 229; 31 *Cyc.*

Jackson v. Dilks.

90 N. J. L.

1219 (B). Agency by estoppel has no proper place in the law of municipal corporations.

We think, as the board of education had the power, under the statute, to contract for the work done and material supplied in this case, there was created by conduct an implied agency, an agency, in fact, on the part of Messrs. Rowland and Wilson; and further, that by implication the contracts of these unauthorized agents have been ratified by the acts and conduct of the school board; hence, it was not error for the trial court to direct a judgment in favor of the respondent and against the appellant.

The judgment will therefore be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—THE CHIEF JUSTICE, PARKER, WHITE, JJ. 3.

THOMAS W. JACKSON, APPELLANT, v. LORENZO C. DILKS,
RESPONDENT.

Submitted December 11, 1916—Decided March 5, 1917.

On an issue of fact, tried by a court and jury, where there is testimony on both sides of a controverted fact, it is not error for the trial court to submit the question at issue to the jury for determination.

On appeal from the Supreme Court.

For the appellant, *Frank Benjamin*.

For the respondent, *Raymond, Mountain, Van Blarcom & Marsh*.

The opinion of the court was delivered by

BLACK, J. The appellant sued the respondent for the sum of \$261.60, interest on a loan of \$2,012.35. The trial resulted in a verdict for the respondent. The respondent was the receiver of the Goeller Iron Works. He received from the appellant a check for the above amount, as a loan, to be used for the payment of wages due to workmen, for which, as security, the respondent assigned preferred wage claims of an equal amount. The receipt was signed "Lorenzo C. Dilks, Receiver of the Goeller Iron Works." This money was repaid to the appellant, by an order of the referee in bankruptcy, by the respondent, as trustee in bankruptcy, but without interest. Hence, this suit to recover the interest. The appellant claims that the respondent is liable to pay the interest individually and the respondent claims that he dealt with the appellant, not individually, but as receiver or trustee in bankruptcy, and his liability, if any, is not an individual liability, but a liability as trustee in bankruptcy.

There are six grounds of appeal, but the only one argued at length in the appellant's brief is the exception to the refusal of the trial court to direct a verdict for the appellant, on the ground that the respondent is personally liable for the amount of the interest sued for. This ground of appeal is the only one that needs any discussion. We have examined, however, all the other grounds of appeal. They are without legal merit.

The testimony shows the receipt was signed by the respondent, as receiver in bankruptcy. The respondent testified that the dealings in this matter with the appellant were with him as receiver in bankruptcy. The money was returned to the appellant from the bankrupt's estate by an order of the referee in bankruptcy. The Goeller Iron Works was indebted to the appellant in a large sum of money. The money loaned was to pay wages that had accumulated and which were then unpaid. The appellant testified that the wage claims were given as security for the money that was advanced, and the respondent agreed personally to pay six per cent. interest on the loan until it was returned. The respondent denies, how-

Smith v. Smith.

90 N. J. L.

ever, that he ever personally promised to pay the interest. Surely this raised an issue of fact, which could only be settled by a jury. The rule to be applied is elemental. It is expressed in these words, where the evidence is in substantial conflict concerning a critical question of fact, it would be error to take the case from the jury. *Friedman v. North Hudson County Railway Co.*, 65 N. J. L. 298, 300; *Delaware, &c., Railroad Co. v. Shelton*, 55 Id. 342; *Piver v. Pennsylvania Railroad Co.*, 76 Id. 713.

The action of the trial court was not error in this respect. As stated above, there is no legal merit in any of the other grounds of appeal. They require no discussion. The judgment of the Supreme Court is therefore affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN. MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

WALTER H. SMITH, RESPONDENT, v. CLARENCE C. SMITH,
EXECUTOR OF JAMES PRAIL, DECEASED, APPELLANT.

Submitted November 21, 1916—Decided June 18, 1917.

1. A judgment or decree entered in the courts of the state of Iowa, under proceedings to foreclose a mortgage and for the redemption of the land, by paying the amount due on a judgment, such decree and proceedings are *prima facie* evidence of the validity of the mortgage, of the amount due thereon, of the lands upon which the same were a lien, of the extent of the lien, and of the right of redemption. This is so, when such judgment or decree is put in evidence, in a suit brought in the New Jersey courts, to recover damages for a breach of the covenants against encumbrances, contained in deeds conveying the lands covered by the mortgage foreclosed.

90 N. J. L.

Smith v. Smith.

2. Remedies are to be regulated and pursued according to the *lex fori*, the law of the place where the action is instituted.
3. There is no statute of limitations in New Jersey, in an action for breach of a covenant against encumbrances.
4. Actual eviction is not necessary, before an action will lie for the breach of a covenant against encumbrances. It is sufficient that eviction may take place.

On appeal from the Warren County Circuit Court.

For the respondent, *L. De Witt Taylor* and *Osiris D. McConnell*.

For the appellant, *William H. Morrow*.

The opinion of the court was delivered by

BLACK, J. The respondent sued the appellant's testator, in the Warren Circuit Court, for a breach of the covenants against encumbrances contained in two deeds made by James Prall, the appellant's testator, bearing date March 8th, 1891. The land conveyed by the deeds is situate in Harrison county, State of Iowa. The case coming on for trial, the record shows, the respective counsel having agreed upon the facts, the court took the case from the jury and directed a verdict for the respondent for \$2,091.08. An exception was then noted to the direction of the verdict. The appellant brings the appeal, and alleges thirteen grounds and reasons for a reversal of the judgment, all of which, in different forms, challenge the right of the respondent to maintain the action. Thus, the first four and the eleventh allege error in the trial court in directing a verdict in favor of the respondent. The fifth, sixth and seventh allege the only action that could be maintained is an equitable proceeding; eighth, certain releases given by the respondent operated as an equitable estoppel against the respondent maintaining the suit; ninth, there was no eviction; tenth, the broken covenants did not run with the land, so that an action could be maintained on such broken covenants; twelfth, the respondent, and those claiming under him, have been in open and exclusive possession of the

Smith v. Smith.

90 N. J. L.

premises since the 30th day of October, 1890, upwards of twenty years next before the commencing of this suit; that such possession is a bar to the right of action asserted by the respondent; thirteenth, the decree or judgment entered in the District Court of Harrison county, Iowa, so far as the same is claimed to be the basis of this action, is of no force or effect against the appellant, as executor of James Prall, deceased. These points are argued by the appellant's counsel at length in an elaborate brief, which fails to convince us that the trial court was in error, or that the respondent had no right to maintain his action.

The correctness of the computation of the amount of the judgment, as directed by the trial judge, is not challenged by any ground of appeal; nor is it argued by the appellant in his brief. We have not, therefore, considered that question, nor is it necessary to follow in detail the argument of the appellant.

A short summary, however, of the essential facts is necessary to a clear understanding of the case. The language of the covenants in each deed is: "That the above-described premises are free from any encumbrances other than roads and highways." At the time of the delivery of the deeds, one Alonzo P. Tukey held a mortgage upon the lands described in the deeds for the sum of five hundred dollars (\$500) and interest. This mortgage was made to Tukey by one John W. Foster, owner of the lands. The mortgage was dated January 25th, 1888. James Prall, the appellant's testator, received his title to the land by virtue of a sheriff's deed under a decree entered in the District Court of Harrison county, Iowa, on September 6th, 1889. This decree was made in a suit brought by James Prall to foreclose a first mortgage upon the same lands for sixteen hundred dollars (\$1,600) and interest, made by the same John W. Foster to D. C. Richman & Son, and by them assigned to James Prall. This mortgage was dated December 16th, 1887. In this foreclosure suit by James Prall, Tukey was made a defendant, by reason of his holding the above mortgage, being a second mortgage upon the lands; no process was served upon him, he did not appear in the action,

90 N. J. L.Smith v. Smith.

and the suit was by order of the court continued as to him. In fact, he had no knowledge of the Prall foreclosure suit until a long time after the sheriff's sale—1897 or 1898. On March 11th, 1908, Tukey brought suit in the District Court of Harrison county for the foreclosure of his mortgage, for the redemption of the land, by paying the amount due on the judgment, in the Prall foreclosure suit. The respondent, in this case, was made a defendant, as were also Peter Reinholdt and Alfred Peterson, who were, at that time, the owners of the equity in the lands, having derived their title from James Prall and the respondent through intermediate grantees. Peterson filed a cross-petition against the respondent, the plaintiff in this suit, to compel him to pay Peterson such sum of money as might be found necessary to redeem the land from the Tukey mortgage and to make Peterson whole in the premises. On June 18th, 1909, a final decree was entered in the Tukey case, wherein it was adjudged that the Tukey mortgage be established as a lien upon the lands in the amount of thirteen hundred and fifty-five dollars and eighty-eight cents (\$1,355.88), with interest from June 18th, 1909. The court directed a special execution to issue for the sale of the lands to satisfy the Tukey lien. The purchaser should pay off the senior lien by paying three thousand dollars (\$3,000), with the accumulated interest thereon, to the clerk of the court for the benefit of the owners of the land sold. On the cross-petition, the court ordered that Peterson was entitled to recover from the respondent, the plaintiff in this suit, such sum as should be necessary under the decree to redeem the lands from the Tukey mortgage, or to satisfy that mortgage.

An appeal was taken by the respondent, the plaintiff in this suit, from this decree to the Supreme Court of Iowa, and that court affirmed the decree. A *procedendo* was issued by that court on April 29th, 1913. After this affirmance, by the Iowa Supreme Court, in order to extinguish the Tukey decree or judgment, as it is called, and free the lands from the lien thereon, the respondent paid Tukey's attorney, on May 23d, 1913, nineteen hundred and six dollars and seventy-six cents (\$1,906.76), being the amount of the judgment, with interest

Smith v. Smith.

90 N. J. L.

and costs. He then took an assignment of the judgment. Respondent then released all of the lands from the lien of the judgment, and thereupon brought the present suit, October 10th, 1913, against the appellant's testator to recover the amount which he paid to extinguish the encumbrance of Tukey, with the result that the trial court directed a verdict in his favor.

The question, as we see it, arising out of this state of facts, and involved in the decision of this case, is whether the respondent, the plaintiff in this suit, had a right to maintain his action in the common law courts of New Jersey to recover damages for the breach of the covenants against encumbrances, and, if so, what law is to be applied to the solution of this problem? The answer to this question depends upon the application of the following-accepted principles of law. The proceedings and decree in the Tukey case are *prima facie* evidence in this case of the validity of the Tukey mortgage, of the amount due thereon, of the lands upon which the same were a lien, of the extent of the lien and of the right of redemption. 11 *Cyc.* 1156, 1157. The law of Iowa governs, as to the lien, on the lands situate in that state. *Griffin v. Griffin*, 18 *N. J. Eq.* 104, 107. It is the law of the state, in which the mortgaged property lies, which governs. *Brine v. Hartford Fire Insurance Co.*, 96 *U. S.* 627, 635; 5 *R. C. L.* 926, § 21. The Iowa Supreme Court passed upon the Tukey mortgage, in an opinion in which the facts as disclosed by this record are quite fully set out. *Tukey v. Reinholdt*, 130 *N. W. Rep.* 727; see *Tukey v. Foster*, 158 *Iowa* 311. From these propositions, it would seem to follow that Prall's liability, the appellant's testator, is to be determined from the judgment or decree entered in the Iowa courts, except, in so far as that liability may be affected, by matters relating to the remedy, *i. e.*, the *lex fori*. Thus, the statute of limitations of New Jersey, if any, would be applied, the period of limitation prescribed by the law of the forum controls. *Jaqui v. Benjamin*, 80 *N. J. L.* 10. A foreign judgment is subject to the statute of limitations of the *lex fori*. *Summerside Bank v. Ramsey*, 55 *Id.* 383. Remedies are to be regulated and pur-

90 N. J. L.

Smith v. Smith.

sued according to the *lex fori*, the law of the place where the action is instituted. *Gulick v. Loder*, 13 *Id.* 68; 5 *R. C. L.* 917, § 11; 941, § 28.

In cases from our courts, in actions for a breach of covenant against encumbrances, it is said the general rule is, the right of action on the covenant against encumbrances arises upon the existence of the encumbrance, irrespective of any knowledge upon the part of the grantee or of any eviction of him or of any actual injury it has occasioned him, so that, if he has paid off or bought in the encumbrance, he is entitled, at least, to nominal damages. *Demars v. Koehler*, 62 *N. J. L.* 203, 208; 7 *R. C. L.* 1163, §§ 78, 79. He may recover the amount fairly and justly paid by him for the removal of the encumbrance, not exceeding the value of the estate. *Hartshorn v. Cleveland*, 52 *N. J. L.* 473, 482; *affirmed*, 54 *Id.* 391; 7 *R. C. L.* 1181, § 104, although he may not yet have paid the same. *Sparkman v. Gove*, 44 *N. J. L.* 252; *Fagan v. Cadmus*, 46 *Id.* 441; *affirmed*, 47 *Id.* 549. An actual eviction or disturbance of possession, unlike a suit for a breach of a covenant of warranty, is not necessary, as a condition precedent, to maintaining an action for the breach of a covenant against encumbrances. *Carter v. Executors of Denman*, 23 *Id.* 260, 270; *Smith v. Wahl*, 88 *Id.* 623. It is sufficient that eviction may take place. *Share v. Anderson*, 7 *Serg. & R.* 43, 61.

There is no statute of limitations in New Jersey in an action for breach of a covenant against encumbrances, barring such an action, if not brought within twenty years after breach of the covenant. *Hasselbusch v. Mohmking*, 76 *N. J. L.* 691; see *Parisen v. New York, &c., Railroad Co.*, 65 *Id.* 413. The counsel for the appellant concedes this, but argues, in the answer to the complaint, he set up accord and satisfaction, as a bar to this action, thereby invoking an analogy to the statute of limitations, citing *Gulick v. Loder*, *supra*; *Parisen v. New York, &c., Railroad Co.*, *supra*, and *Blue v. Everett*, 55 *N. J. Eq.* 329, as illustrative cases on which to rest the defence of presumptive satisfaction received for a breach of the covenant. The obvious answer to this is, of

course, those cases and the principle therein illustrated have no application to the facts of this case, as disclosed by the record. At best, that is a rebuttable presumption of satisfaction. The proceedings in the Tukey case show satisfactorily the reasons for the delay. No evidence was offered or produced in denial of the facts shown by that record, the facts not being controverted. It is hardly necessary to pursue this discussion farther in detail. The record consists entirely of exhibits and documents, over which there is no dispute. No evidence was produced to controvert the findings of the decree in the Iowa courts in the Tukey case.

Upon the undisputed facts, and the law applicable thereto, we are satisfied that the respondent was entitled to maintain his common law action in the courts of New Jersey. In our view, this determines the case. As stated above, the amount of damages as calculated by the trial court is not challenged or argued, so we express no opinion upon that point.

Finding no error in the record, the judgment of the Warren Circuit Court is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, JJ. 9.

For reversal—THE CHIEF JUSTICE, SWAYZE, BERGEN, WILLIAMS, TAYLOR, GARDNER, JJ. 6.

90 N. J. L.Erwin v. Traud.

GRACE W. ERWIN, ADMINISTRATRIX, ETC., RESPONDENT,
v. WILLIAM A. TRAUD, APPELLANT.

Argued November 22, 1916—Decided March 5, 1917.

A traffic regulation giving an automobile driver the right of way at a street intersection against a vehicle approaching the crossing at the same time from his left, does not relieve him of the legal duty to use reasonable care to avoid colliding with such vehicle should its driver disregard such right. In case of injury to a passenger on the latter vehicle resulting from such a collision under circumstances indicating a disregard of that legal duty, it becomes a jury question whether under all the circumstances, including the traffic regulation, there was negligence on the part of the driver having the right of way.

On appeal from the Supreme Court.

For the appellant, *Frank E. Bradner*.

For the respondent, *Lum, Tamblyn & Colyer*.

The opinion of the court was delivered by

WHITE, J. Respondent sued as administratrix of Frank C. Young, who, while a passenger on an auto-bus running west on Park avenue, in Newark, was killed in a collision between said auto-bus and the Ford automobile of the appellant, which was running south on Fifth street, a street crossing Park avenue at right angles. As appellant reached the near side of Park avenue he had a clear view eastward down that avenue which is sixty feet wide between curbs, and the jury may properly have concluded that if he had looked in that direction he would have seen the approaching auto-bus in ample time to avoid the collision. An ordinance of the city of Newark provided "every driver or operator of a vehicle approaching a street intersection shall grant the right of way at such intersection to any vehicle approaching from his right." Under the requirements of this ordinance, if the two

Erwin v. Traud.

90 N. J. L.

vehicles here involved reached the intersection substantially at the same time, appellant's car should have been permitted to cross first, and the claim is therefore made in his behalf that he was not negligent in assuming, without looking to see (if he did not look) that no vehicle was crossing from his left at the same time that he was crossing, and that there should have been a nonsuit or a direction of a verdict in his favor on this ground.

We are unable to adopt this view for two reasons—*first*, the evidence was of such a nature that it was a question of fact whether the two vehicles did reach the crossing at substantially the same time. There was evidence that appellant's car was running "very fast," at a "terrible gait," and that it struck the auto-bus on the latter's side. From this the jury were justified in finding, if they did so find, that the auto-bus reached the crossing first and was consequently entitled to cross first; *second*, the fact, if it was a fact, that appellant's car was entitled to cross before the auto-bus crossed did not absolve appellant's driver from (using the language of Mr. Justice Kalisch, in *Pool v. Brown*, 89 N. J. L. 314) his "legal duty to use reasonable care to avoid colliding with other vehicles and persons in the highway." This is not a case, as was aptly suggested by the learned trial judge in his charge to the jury, where the driver looked and saw the approaching auto-bus in a position and going at a rate of speed which justified him in thinking that it would, as in duty bound, yield the right of way to him. It was a case where the driver, as the jury from the evidence may have found, did not look to his left at all. This, we think, as a reasonably careful man he should have done where, as here, there was full unobstructed opportunity for him to have done so. In *Earle v. Consolidated Traction Co.*, 64 N. J. L. 573, this court said that while the first to reach a crossing had the right of way, yet, where it appeared to him that the other was not yielding this right, he could not recklessly proceed, but was bound to stop or to turn aside if he could by the exercise of due care do so. While this is a case where there was an equally-divided court, we, nevertheless, applied the same doctrine in

Rabinowitz v. Hawthorne, 89 N. J. L. 308. If, as in those cases decided, it is true that there still remains a duty to use reasonable care to avoid a collision in a case where a driver has secured a right of way by first arriving at a crossing, it must be equally true that such a duty also exists where the right of way is, as here, artificially or arbitrarily secured by municipal ordinance. There being a duty to use reasonable care to avoid a collision, and evidence indicating that such care was not used, a jury question results, although it also appears that the collision was caused by a disregard of municipal traffic regulations by the other driver, for whose action, however, respondent's decedent, as a passenger, was not responsible. The court cannot arbitrarily say that a failure to look, under such circumstances, was an exercise of reasonable care. We think the learned trial judge correctly stated the law when he charged the jury: "The fact that there was such an ordinance did not relieve the defendant from using that degree of care which was reasonable under like circumstances. You are to say from all the evidence, considering where the accident occurred, the grade of the streets, the ordinance giving vehicles coming from the right and crossing from an intersecting street the right of way, whether the accident was caused by the negligence of the defendant."

We think, therefore, that the learned trial judge was right in refusing appellant's motions for a nonsuit and for direction of a verdict in his favor.

There was also evidence of a more or less contradictory character tending to show that the driver of the auto-bus, because of having passed a touring car shortly before, instead of occupying his right hand, which was the northerly side of Park avenue, was in fact a little south of the centre of that avenue in approaching Fifth street, and that in so doing his negligence contributed to the accident. It is urged in this connection that the learned trial judge should have charged without qualification appellant's request: "If the jury is satisfied that the driver of the auto-bus was driving west on the south side of Park avenue, they must then assume that

Erwin v. Traud.

90 N. J. L.

the driver was *prima facie* negligent, and if they are further satisfied that Frank C. Young was aware of such negligence of the driver and did not request him to change his course, or warn him of the danger, or if the said Frank C. Young requested the driver to take that course on the south side of Park avenue, then they must find that Frank C. Young was also negligent."

The court said: "I so charge you, but you must recollect in applying that rule that the burden of proving the contributory negligence of Frank C. Young is on the defendant, and that there is no assumption that he was negligent unless such fact is established to your satisfaction by the evidence of the defendant."

This answer to the request was at least quite as favorable to appellant as he was entitled to have it. There was no evidence of a request from Young to drive on the south side of the street, and his observation of danger and reasonable opportunity to request a change of course was at most only surmise. The statement that Young's negligence must be established by evidence of the defendant might have been harmful if there had been any evidence on either side of such negligence, but, under the circumstances, it amounted to nothing more than what it was obviously intended to mean, viz., that in the absence of such evidence, the burden rested with the defence to establish such negligence. We think in this connection that there was no error in the affirmance of respondent's second request to charge to the effect that contributory negligence of the driver of the auto-bus, if there was any, was not, standing alone, imputable to the passenger Frank C. Young.

We believe that the foregoing substantially answers all the specifications of error and the judgment is therefore affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GAR-
RISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN,
KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS,
GARDNER, JJ. 14.

For reversal—None.

90 N. J. L.'Albrecht v. Penna.' R. R. Co.

CHARLES ALBRECHT, RESPONDENT, v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Hudson County Circuit Court.

For the appellant, *Vredenburg, Wall & Carey (John A. Hartpence on the brief)*.

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

AMERICAN WOOLEN COMPANY, APPELLANT, v. EDWARD I. EDWARDS, COMPTROLLER, ET AL., RESPONDENTS.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, whose opinion is reported in 90 N. J. L. 69.

For the appellant, *Lindabury, Depue & Faulks*.

American Woolen Co. v. Edwards, Comptroller. 90 N. J. L.

For the respondents, *Francis H. McGee* and *John W. Westcott*, attorney-general.

PER CURIAM.

For the purposes of the present case we find it unnecessary to add anything to the reasoning of the opinion delivered in the Supreme Court. But our adoption of that opinion for the purposes of the present decision is not intended to be taken as deciding more than that, the state tax in question is "levied" in the sense intended by the statute at least as early as the first Tuesday in May, which is the latest date upon which the annual return of the corporation could have been made to the state board of assessors. The act says "on or before the first Tuesday in May;" but how long before that date is not specified. Inasmuch as the return is made as of the 1st day of January preceding, it is obvious that it may be made at any time between the 1st of January and the first Tuesday in May; and it is equally obvious that the state board of assessors may certify to the comptroller at any time between the actual receipt of the annual report from the corporation and the first Monday of June, the amount of tax due at the rates fixed by the act. *Comp. Stat.*, p. 5291, § 505. It may well be argued that in contemplation of law the annual tax is levied on the 1st day of January, being the date as of which the taxable status of the corporation is ascertained; and so the United States Supreme Court seems to have thought. *New Jersey v. Anderson*, 203 U. S. 483, 494. We do not decide the point, as it has not been fully argued, and is not necessary to an affirmance of the judgment below, but content ourselves with reservation of the question for decision if and when it is squarely raised.

The judgment of the Supreme Court is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER. JJ. 13.

For reversal—None.

90 N. J. L.

Carson v. Scully.

ROBERT CARSON, APPELLANT, v. THOMAS J. SCULLY ET AL., RESPONDENTS.

(Middlesex county recount case.)

ROBERT CARSON, APPELLANT, v. THOMAS J. SCULLY ET AL., RESPONDENTS.

(Monmouth county recount case.)

ROBERT CARSON, APPELLANT, v. THOMAS J. SCULLY ET AL., RESPONDENTS.

(Ocean county recount case.)

Argued December 4, 1916—Decided January 19, 1917.

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the court impossible.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 458.

WALKER, CHANCELLOR. My vote to reverse the judgment of the Supreme Court in this case is based solely upon the view that the legislature has not provided any machinery for carrying on a recount of votes cast for candidates for congress, although I find in the statute a declaration of intention that recounts shall extend to congressional elections.

The learned justice, who wrote the opinion in the court below, states the case when he says:

"The insistence of counsel for the prosecutor is, that the legislative intent was to confine the provisions of this section (159 of the act concerning elections) to candidates for election, such as state senators, members of assembly, surrogates and other county and municipal officers who, if elected, are, under the statute, entitled to receive their certificates of elec-

tion from the county board of canvassers. And, in furtherance of this view, it is strenuously argued that the clear legislative design to exclude candidates at an election for governor, United States senator, members of congress and presidential electors, whose election under the statute is to be determined by the state board of canvassers, is made manifest by the provisions of sections 160 and 161 relative to the recount of votes, and section 164 relative to contested elections for county offices," &c.

I agree with the view held by the learned justice that the statute (*Pamph. L.* 1898, p. 237, § 159; *Comp. Stat.*, p. 2073; *Pamph. L.* 1909, p. 41) evinces an intent to give to any candidate at any election, who shall have reason to believe that an error has been made in counting or declaring the vote of such election, whereby the result has been changed, the right to a recount; and to this extent, disagree with the contention of counsel that the section evinces a legislative intent to confine the provisions to candidates for the offices named; but, as I find in the act no machinery provided for the carrying on, ascertaining or certifying the result of a recount of votes cast in congressional elections, I am constrained to the view that no such recount can be had, not that it was not the intention of the legislature to give it.

There was a time in the history of our state when no recount of votes cast at any election could be had (except as an incident to proceedings in a contested election before a body authorized to inquire into and decide such a question, as the house of representatives, which is the sole judge of the election and qualification of its members, and the Supreme Court on *quo warranto*, where the right to office was being inquired into). In fact, we had no statute authorizing a recount of votes until as late as 1880. See the supplement to "An act to regulate elections." *Pamph. L.* 1880, p. 229; *Rev. Supp.*, p. 277; *Gen. Stat.*, p. 1327, § 195. And this extended only to candidates for member of the state senate or assembly.

By a supplement to the Elections act (*Pamph. L.* 1895, p. 659, § 13; *Gen. Stat.*, p. 1367, § 369) it was provided that if any candidate for any office shall pray a recount of the whole

90 N. J. L.Carson v. Scully.

or any part of the vote, by petition to one of the justices of the Supreme Court, and shall deposit such sum as the justice shall order as security for the payment of expenses, it shall be the duty of the justice to order such recount by the county board of elections under such supervision as he may order, &c., and on the conclusion thereof shall certify the result, which certificate shall take the place of that originally issued by the canvassing board. The present statute, with reference to recount of votes, is to be found in "An act regulating elections" (Revision of 1898), *Comp. Stat.*, p. 2073, § 159; *Pamph. L.* 1909, p. 41 *et seq.*, and provides that whenever any candidate at any election shall have reason to believe that an error has been made by any board of elections or of canvassers in counting or declaring the vote of such election, whereby the result has been changed, such candidate may apply to any justice of the Supreme Court who shall be authorized to cause, upon such terms as he may deem proper, a recount of the whole or such part of the votes as he may determine, to be publicly made under his direction by the county board of elections, and if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such justice, in case of candidates, shall revoke the certificate of election issued to any person and shall issue in its place another certificate in favor of the party who shall be found to have received a majority of the votes cast at such election. Section 159. That whenever any such certificate shall be issued by such justice, the same shall be filed with the clerk of the county or municipality in and for which such election was held, and the clerk shall make and certify a copy thereof and deliver it to the person who shall be so declared elected, and in case of an election for senator, assemblyman or any county officer, shall transmit to the secretary of state another copy of such certificate. Section 160. That any applicant for such recount shall deposit with the county clerk such sum as the justice shall order as security for the payment of the expenses of the recount, or if such justice shall order, shall file with the county clerk a bond to the incumbent, to be approved by the justice, in such sum as

Carson v. Scully.

90 N. J. L.

he may require, conditioned to pay all costs and expenses in case the original count be confirmed or the result of such recount is not sufficient to change the result, and if an error sufficient to change the result has been made, the expenses shall be paid by the county or municipality in and for which such election was held. Section 161.

It will be observed that section 13 of the act of 1895, and section 159 of the act of 1898, as amended by *Pamph. L. 1909, p. 41*, omit mention of the offices, candidates for which may apply for a recount, while the act of 1880 expressly confined recounts to elections for state senators and assemblymen. Assuming that the recount provisions of the act of 1895 are as broad as those of the acts of 1898 and 1909, it would be quite useless to analyze them, as it is the latest statute with which we have to deal in the case at bar.

That statute (*Pamph. L. 1909, p. 41*), which is a supplement to the Election act (Revision of 1898), purports to amend section 159 of the act of 1898 "to read as follows," and then goes on to re-enact section 159 *verbatim et literatim*, and adds another section—section 2—which enacts that the provisions in section 159 relating to recount of votes upon any *referendum* or *question* submitted to the electors shall apply to those submitted at the last general election (1908), if applied for within thirty days after the passage of that act (1909), the time of application for which, under the provision of section 159, had expired. Therefore, the statute stands just the same, with reference to the recount of votes cast for *candidates* at elections, as though the amendment of 1909 had not been passed.

The provision in section 159, that "if it shall appear upon such recount that an error has been made sufficient to change the result of such election," the justice shall revoke the "certificate" of election already issued, &c., does not come in aid of the contention of the appellant to the slightest extent, because the word "certificates" has reference to the word "candidates," the whole clause reading, "and if it shall appear upon such recount that an error has been made sufficient to change the result of such election, then such justice

in the case of *candidates* shall revoke the *certificates* of election issued to *any person*, and shall issue in *its* place another *certificate* in favor of *the party* who shall be found to have received the majority of the votes cast at such election." The provision that in the case of *candidates* the *certificates* shall be revoked, clearly comprehends the case of recounts for more than one candidate at the same time—as, for instance, a recount before a county board of canvassers of the votes cast at an election for surrogate of the county, and of mayor, or say, alderman of a city within the county—and yet the act goes on and provides that after the *certificates* shall be revoked, the justice shall issue in *its* place another *certificate* in favor of the *party* who shall be found to have received the majority of the votes cast at the election—although *certificates* may have to be issued to *persons* as suggested. This alternate use of nouns in the singular and plural numbers, when either one or the other only should be employed, while ungrammatical, does not, in anywise vitiate the section; but, on the contrary, because the plural noun is thus employed, it cannot be laid hold of as an argument for the contention that the votes of three counties, comprising a congress district, may be ordered recounted, because a justice of the Supreme Court may make superseding *certificates* as well as *certificate*, because, as *stated*, the noun *certificates* is used only in reference to *candidates*, comprehending, plainly one *certificate* for each *candidate* obtaining a majority on a recount; and this, quite aside from the fact that congressmen get no *certificates* from county boards, but only one *certificate* from the state board of canvassers.

The popular and generally accepted meaning of language is to be applied to the construction of a statute in the absence of a legislative intent to the contrary. *Conover v. Public Service Railway Co.*, 80 N. J. L. 681. The word "any" means "one out of many * * * and is given the full force of 'every' or 'all.'" *Bouv. L. Dict. (Rawle's rev.)* 205.

In *Purdy v. The People (New York Court of Errors)*, 4 Hill 384, Scott, senator, in his opinion (at p. 413), observes: "Johnson says that the word 'every' means each one of all, and

Carson v. Scully.

90 N. J. L.

gives this example: 'All the congregation are holy, everyone of them. *Numbers.*' The same lexicographer defines 'any' to mean *every*, and says: 'It is, in all its senses, applied indifferently to persons and things.'"

Now, it must be perfectly obvious that when the legislature, in section 159 of the present act concerning elections, said that any candidate for any office might have a recount, &c., it meant what it said. The words define themselves and there is no room for construing them contrary to their plain and ordinary meaning. I start, therefore, with the proposition that the legislature meant to give a recount to a candidate in a congressional election. But, it must be equally obvious that a recount cannot be carried on without machinery provided for that purpose. And the act of 1898, as we have seen, provides that machinery, but restricts its operation to a recount for *county or municipal offices*, for the recount is to be had *by the county board of canvassers* and the certificate of the result is to be filed with *the clerk of the county or municipality in and for which the election was held*; and the expenses, if an error be made sufficient to change the result, are to be paid by *the county or municipality in and for which the election was held*.

Now, an election for congressman is not held in and for a county or municipality, but in and for a "district" created by the legislature, and these districts have no clerks, and no certificates of election are given congressmen-elect by any officers of their respective congressional districts; in fact, there are no such district officers.

The present act (*Pamph. L. 1912, p. 912*) divides the state into twelve congress districts, the one in question being composed of the counties of Middlesex, Monmouth and Ocean, called in the act the "third district." Admittedly, a single county could be constituted a district, but none is in the act mentioned, and, what is more to the purpose, several counties are subdivided in creating districts, notably the sixth, which is composed of the counties of Bergen, Sussex and Warren, and the townships of Pompton and West Milford, in the county of Passaic.

If the decision of the court below is right, then a recount of votes cast in a gubernatorial election can be had on the application of an unsuccessful candidate. This recount would have to be made upon an order of a justice of the Supreme Court, under his direction, "by the county board of elections," after due notice, &c. If made, the "county board" would have to swell into twenty-one different county boards of election and "the clerk of the county or municipality in and for which such election was held," would have to be multiplied by the total number of county clerks in the state. And all this without any legislative provision made therefor. The analogy in the case of votes cast in a congress district is entirely apposite to that of an election for governor. Furthermore, if the result were changed, how would the expenses be paid? That act (section 161) provides, as already noticed, that the applicant for a recount "shall deposit with the county clerk such sum as such justice shall order as security for the payment of such recount, or if such justice shall so order, shall file with the county clerk a bond to the incumbent, * * * and if it shall appear that an error sufficient to change the result has been made, then the expenses of such recount shall be paid by the county or municipality in and for which such election was held." As an election for governor is not held in and for a county or municipality, but for the whole state, it would be entirely impracticable to order the expenses paid in a gubernatorial contest, where the result had been changed by a recount, under the provisions for payment found in the statute, namely, *by the county or municipality in and for which the election was held*, because an election for governor is held neither for a county nor municipality, but *in every voting precinct* in the state, and, it may be said, *for the whole state, but not for any county or municipality of the state*. Payment of the expenses of a congressional recount by the political subdivisions comprising the district—counties and municipalities, as the case might be—where the result had been changed, in my judgment, could only be made by court action transcending construction, and amounting to judicial legislation—a thing forbidden. Whether, in case the result

Carson v. Scully.

90 N. J. L.

should not be changed, the money deposited could be laid hold of for payment, or the bond enforced for that purpose, as a voluntary obligation (see *Emanuel v. McNeil*, 87 N. J. L. 499), need not be considered.

The scheme of a congress district recount is not workable under the provisions of the act. I do not say that such a scheme could not be made workable by legislation. On the contrary, it is plain that it could.

Ample provisions are made in the act concerning elections for contests for governor and for members of the legislature and congress. The ninth congress district is composed of the cities of East Orange and Orange, and certain wards of the city of Newark, all in the county of Essex. If an election recount were held in this district, the certificate of the justice of the Supreme Court might physically be filed with the city clerks of the Oranges, but could not be filed with the clerks of the several wards of Newark, as there are no ward clerks.

The *modus operandi* of canvassing the votes cast at elections is, shortly, as follows: The county board of elections in each county is constituted the board of county canvassers. Section 102. The members of the county board proceed to examine the statements and copies of statements of elections which shall be produced before them, and canvass and determine the votes cast at the election and make two statements of the result containing the number of votes given in each election district for any office to be filled. Section 108. Such boards deliver one of the statements, in case of an election held for members of the house of representatives or for electors of president and vice president or for governor or senator, members of assembly or any county officers, to the secretary of state. Section 110. In case of an election for one or more members of the house of representatives or electors of president or vice president or for governor, the secretary of state lays before the board of state canvassers two such statements. Section 118. The governor and four or more of the members of the senate attend at Trenton, on a certain date, for the purpose of canvassing and estimating the votes cast for each person for whom votes have been given for mem-

90 N. J. L.Carson v. Scully.

bers of the house of representatives or electors of president or vice president or governor, and determine and declare the person or persons who shall, by the greatest number of votes, have been duly elected to such office or offices. Section 119. The board proceeds to make a statement of the result of such election which is delivered to the secretary of state and filed by him. Section 123. And the secretary of state makes as many copies of the statement of the determination of such board as there are persons thereby declared to be elected and delivers one of the same to each person who shall be so elected. Section 127.

By this summary of the election machinery, it will be seen that no certificates of election issue to congressmen-elect by county boards of canvassers, who merely make a certificate of the result of election for congressmen as it appears returned in the several election districts, and send that certificate to the secretary of state, who lays it before the state board of canvassers, who make a determination as to who is elected to congress in any given district. There is no provision in the statute for any revocation by a justice of the Supreme Court of any certificate made by the state board of canvassers. As the certificates of election of congressmen emanate, not from county boards of canvassers, but from the state board, how can interference with the work of a county board affect the holder of a certificate from the state board?

Because there is no practical method of recounting the vote in a congress district, an apparently unsuccessful candidate is not thereby deprived of the right to show that he, and not his rival, as certified, was elected; for, as already remarked, the house of representatives is the judge of the election of its members, and our statute provides an ample method of contesting the election of members of congress. Section 153 *et seq.*

My view is, that while the legislature in the revision of the Election law of 1898 intended to provide for a recount to any unsuccessful candidate for any office at any election, upon proper showing made, which would include congress districts, it failed to provide the method whereby lawfully, step by step,

the proceeding could be effectively carried on and a definite result obtained and certified.

Sir William Blackstone, treating of the constructions of statutes, says: "Acts of parliament that are impossible to be performed are of no validity." 1 *Bl. Com.* 91. The doctrine thus expounded by the learned commentator is, by parity of reasoning, equally applicable to a part of an act which is impossible of performance, as well as to an entire act that cannot be put into operation. It has been held, in this state, that parts of acts which are unconstitutional are to be excised to the extent to which they are invalid and the rest of the act upheld, if the parts are wholly independent of each other. *State v. Davis*, 72 N. J. L. 345, and cases cited; *affirmed*, 73 *Id.* 680. See, also, *Meehan v. Excise Commissioners*, *Id.* 382, 388. It must be perfectly obvious that a provision in a statute for a recount of votes cast for a state senator is entirely independent of one for a recount in a congressional election, and that, if the latter be invalid or unenforceable, the former shall, nevertheless, stand.

In *Commonwealth v. Gouger*, 21 *Pa. Super. Ct.* 217, it was held (at p. 229):

"In the construction of statutes it may sometimes become necessary to transpose words or even to supply or strike out a word which the context shows was omitted or inserted by mistake. Instances are not lacking in the reports where this has been done in order to effectuate the intention of the legislature. But where an enactment is plain and sensible, and, according to any meaning, broad or narrow, popular or technical, which may be ascribed to the words, does not apply to the case in hand, it is not permissible for the courts to add or omit words, in order to make it so apply, even though it may be clear to them that the case is as fully within the mischief to be remedied as the cases provided for. This would be, not to construe, but to amend the law, which is within the exclusive province of the legislature. * * * When a court has gone to the verge of its power of construction, there will sometimes remain what is termed a *casus omissus*—a case within the mischief to be remedied and possibly within the general

intent of the legislature as disclosed by the act—and yet not provided for therein. In such case the legislature alone can cure the defect.”

The doctrine laid down in *Commonwealth v. Gouger* is entirely apposite. I think it clear, as I have said, that the recount provision of the Election law is intended to apply to the case of a congressional election. A miscount in an election for congressmen is fully as mischievous and equally entitled to be remedied as a miscount in the case of county or municipal officers; but the enactment is so plain in providing *the method* for recounting votes cast for county and municipal candidates, and ascertaining and certifying the result, and so plainly fails to provide any such machinery in the case of candidates for congress, that it is not permissible for the courts to add or omit words in order to make the act apply to the class of candidates excluded. And, by the way, how do candidates for county and municipal offices derive their right to a recount? It is not because they are named in section 159. Yet, nobody will deny that they have the right. It is derived from the language “any candidate at any election.” If this language applies to the case of a surrogate of a county and to the mayor of a city, and, certainly, it does, it equally applies to a congressman. Therefore, I repeat again, that the office of congressman is within the purview of section 159, which clearly intends to give a candidate for congress, in given circumstances, a recount; but, the act failing to provide a method for carrying on a recount and certifying to its result in the case of a congressional election, it is, to that extent, impossible of being performed.

The *casus omissus* in the statute under consideration is the lack of provision of machinery for carrying on a recount in the case of a contested election in a congress district, notwithstanding the act evinces a clear intention to give a recount in such case as well as in all others. The omission was doubtless inadvertently made, and probably came about in this way: The act of 1880, which gave a recount only to candidates for the state senate or assembly, provided for the recount being made in the particular county, with the superseding

Carson v. Scully.

90 N. J. L.

certificate, if one were issued, to be certified by the county clerk and delivered to the person found to be elected. While in the supplement of 1895 and the Revision of 1898, the language granting recounts and restricting them to candidates for the senate and assembly, found in the act of 1880, was enlarged so as to apply to candidates for any and all offices, but the machinery for recounts, certification of the result, &c., was allowed practically to remain the same, and was not correspondingly enlarged so as apply to congressional elections, which, of necessity, require other provisions for enabling a recount to be carried on, as an election for congressman is not held in and for a county or municipality, and his certificate emanates, not from a county board of canvassers, but from the state board of canvassers, for the superseding of whose certificate of election by a justice of the Supreme Court no provision is made in the statute.

It is not an answer to say that one of the justices of the Supreme Court, upon petitions preferred for that purpose, made three several orders for a recount of the votes cast at the last general election in the counties of Middlesex, Monmouth and Ocean, respectively, for member of the house of representatives of the United States, under his direction, by the county boards of election in those counties respectively. Those orders were, in my judgment, unauthorized by the statute and should be held to be null and void.

The Chief Justice and Justices Swayze, Trenchard and Minturn and Judge Williams have authorized me to say that they concur in the views expressed in this opinion.

WHITE, J. The question is, Do the recount provisions of the act concerning elections (2 *Comp. Stat.*, p. 2125) apply to an election of a congressman for the third congressional district, comprising the three counties of Middlesex, Monmouth and Ocean?

The language of the act provides for a recount. "*Whenever any candidate at any election shall have reason to believe that an error has been made by any board of election or of canvassers in counting the vote or declaring the vote of such election,*" &c.

It is urged that the court should modify this language of the legislature by, in effect, reading into it after the word "candidate" the words "for state senator, member of assembly or county or municipal officer." It is said this should be done because subsequent provisions of the act provide for the issuing of a certificate by the Supreme Court justice holding the recount in place of the certificates issued by the boards of canvassers, and as there is no certificate of election from the county boards of canvassers in elections for United States senator, member of congress, presidential electors or governor of the state, the act, it is urged, must be held not to apply to these officers. A further argument to the same effect is said to arise from the fact that a subsequent section of the act provides, with reference to the expense of such recounts, that in case a recount shall result in favor of the applicant the expense shall be borne by the county or municipality "in and for which such election was held," and that as elections for the officers above mentioned are state-wide, or, at least, congressional district-wide, this provision for the county or municipality bearing the expense is inappropriate, and therefore indicates that the act does not apply to those elections.

These reasons, it may be remarked incidentally, apply with equal force to the election, say, of an alderman from a single ward of the city of Newark, or of a ward councilman of any other municipality having ward representation in its governmental body. No certificate is issued to such alderman or councilman by any board of canvassers and the election is not municipality-wide, nor is the expense, in case of a successful recount, confined to the ward where the election and recount took place, but must be borne by the municipality-at-large. No one, however, suggests that the recount provisions are not applicable to an election of such an alderman or councilman. On the contrary, it is here conceded and urged that they are so applicable.

I take it that these certificate and expense provisions are not inconsistent with the wide scope given the act by its express language, "any candidate at any election," but that, on the contrary, they simply provide the machinery to carry out

Carson v. Scully.

90 N. J. L.

that broad scope in conformity with the political scheme adopted by the state for holding elections. That scheme, as I understand it, is that for the purpose of holding elections there are two divisions of the state, namely, municipal and county. For all municipal officers the municipality is the political unit which holds the elections. For all other elections in the state the county is the political unit which holds such elections. In the municipality, if the election is for mayor, or in commission governed cities for commissioners, the election is municipality-wide, and if the election is for an alderman or a councilman from a particular ward or subdivision, the election is not municipality-wide; but in either case the election is "held in and for the municipality," and is at the municipality's expense, although in one case it is municipality-wide and in the other it is not. The municipality is the political unit in the electoral scheme of the state for holding this class of elections. In all other elections the county is the political unit to hold the elections. Where a governor is to be elected, although his office is state-wide and the election is by the voters of the entire state, the political units that hold the necessary elections are the counties, and each county bears the expense of its own election. The election held in each county for the office of governor of the state is in effect an election "in and for that particular county," although the office is state-wide and the result in the particular county does not in itself decide who is elected to the state-wide office. So, with reference to a United States senator and presidential electors, and, substituting the congressional district for the state, with reference to a congressman.

This view (which, like all others herein expressed, is only advanced as that of an individual member of the court and not as that of the court itself, which court, of course, in a case, as here, of a tie vote, does not decide or express any view) supplies, in my judgment, a consistent working basis for all of the provisions of the Recount Election law. It removes the alleged inconsistency of each county bearing its own successful recount expense, although more than one county is involved, and a liberal construction of the certificate

90 N. J. L.

Carson v. Scully.

provisions (and all election laws should be liberally construed in the spirit of their enactment) would make the Supreme Court justice's certificate a substitute for the declarations of results by, or certificates of, election boards, as the case might be, so as to make a reality of the express provision of the act that the Supreme Court justice's certificate "should supersede all others and entitle the holder thereof to the same rights and privileges as if such certificates had been originally issued by the canvassing board." The change from the word "certificate" to its plural "certificates" also made by the amending act of 1909 (the present Recount act) authorizing the Supreme Court justice holding a recount to revoke the "*certificates*" of election already issued to any person, instead of to revoke the "*certificate*" of election already issued to any person, as the law theretofore read, would seem to accord with this view, and to contemplate a revoking of all records of the result of the election of whatsoever description, including all certifications thereof, and the substituting therefor of the Supreme Court justice's certificate, the same to have the effect indicated by the above-quoted language.

I think, therefore, that there is no substantial reason for, in effect, reading into the act the words "first above indicated," thereby changing the broad language, "any candidate at any election," into "any candidate for state senator, member of assembly or county or municipal office." I think such a judicial reading into the statute of these words would be particularly unjustifiable, in view of the fact that the recount provision of our Election law as it was first enacted in 1880 did contain a similar limitation in the words "wherever any candidate at any election in this state for member of the senate or of the assembly," &c., and that, subsequently, that limitation was omitted in the present act and the language was made to read "*whenever any candidate at any election,*" &c. Surely, the legislature in changing the law with reference to recounts from one applying only to "a candidate for state senator or member of the assembly" to "any candidate at any election," did something which has a very significant

bearing on what it is now suggested this court ought to read into the act.

Another indication of the wide change contemplated by the act of 1909 is found in the new provision in that act with reference to a recount in referendums, in the following language: "Whenever *any* citizen shall have reason to believe that an error has been made by *any* board of canvassers in counting the vote or declaring the result of *any* election upon *any* referendum submitted to the electors." &c.

But even in the absence of such an historical indication of the legislative intent, the language of the present act is, in my judgment, plain and certain, and therefore is not properly subject to judicial construction into anything other than what it says. As above stated, I find no real conflicting provisions in the act, but, if I did, I should still think this language "any candidate at any election" too plain for constructive modification.

"Where the purpose of the lawmakers is expressed in language so plain as to make it unmistakable, it must be interpreted by the court, as it is written without regard to its wisdom or its apparently unwise limitations."

This is the language of this court in *Island Heights and Seaside Park Bridge Co. v. Brooks & Brooks*, 88 N. J. L. 613, citing *Douglass v. Freeholders of Essex*, 38 Id. 214.

In the case of *Bullock v. Biggs*, 78 N. J. L. 63, this court notes with approval the exact words of Chief Justice Beasley in *Douglass v. Freeholders of Essex*, namely: "Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity of the result, is out of place."

It is for the reasons above expressed that I have recorded my vote for affirmance of the decision of the Supreme Court upholding the applicability of the recount provisions of the Election law to the congressional election here involved.

I am requested by Justices Garrison and Black and Judges Heppenheimer and Gardner to say that they unite in the views herein expressed.

90 N. J. L. *Carton v. Trenton & Mercer Co. Trac. Corp.*

For the appellant, *Alan H. Strong* and *Theodore Strong*.

For the respondents, *Thomas P. Fay* and *Lindley M. Garrison*.

PER CURIAM.

The judgment under review herein is affirmed by an equally-divided court.

For affirmance—GARRISON, BERGEN, BLACK, WHITE, HEPENHEIMER, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, PARKER, MINTURN, WILLIAMS, JJ. 7.

SARAH CARTON, RESPONDENT, v. TRENTON AND MERCER COUNTY TRACTION CORPORATION, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *George W. Macpherson*.

For the respondent, *James J. McGoogan*.

PER CURIAM.

Plaintiff had a verdict and judgment for damages on account of personal injuries which she admittedly sustained while alighting from a street car of the defendant on which she was a passenger. Her claim, supported by her own testimony on direct examination, and also on cross-examination, was that as she was stepping down from the car, and before she fully reached the ground, the car was negligently started,

Caruso v. Montclair.

90 N. J. L.

causing her to fall and inflicting the injury in question. This was contradicted by defendant's evidence, both of the occurrence and of alleged admissions made by plaintiff before the trial.

The only grounds of appeal argued are that the verdict was against the great weight of evidence, and that the weight of defendant's evidence was so overwhelming that the court should have granted the motion for a directed verdict for defendant. With the first ground we have nothing to do except so far as it is included in the second. As to that, it is enough to invoke the thoroughly-settled rule that a verdict will not be directed in cases where there is a fair conflict of testimony on a fundamental issue. Such was the situation at the trial. The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

LUIGI CARUSO AND CARMELA CARUSO, APPELLANTS, v.
TOWN OF MONTCLAIR, RESPONDENT.

Submitted July 10, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellants, *Gaetano Belfatto* and *Wilbur A. Heisley*.

For the respondent, *Hartshorne, Insley & Leake*.

90 N. J. L.

Chrisafides v. Brunswick Motor Co.

PER CURIAM.

The same question presented in this case was involved in *Nicola Caruso and Guiseppi Caruso, appellants, v. Town of Montclair*, decided at the present term (*ante p.* 255), and for the reasons given in the opinion filed in that case, the judgment herein will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

STRATTON CHRISAFIDES, RESPONDENT, v. BRUNSWICK MOTOR COMPANY AND JOHN KNAUSS, APPELLANTS.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellants, *William E. Holmwood*.

For the respondent, *Winfield S. Angelman*.

PER CURIAM.

The record here for review discloses that the appellants set out eleven grounds of appeal. Seven of these are based upon alleged refusal of the trial judge to charge the seven specific requests set out in the grounds of appeal. The record does not show that the court was asked to deal with any of the requests, nor does the record show that the court refused to charge the same, and that an objection was noted to such refusals.

Under *Kargman v. Carlo*, 85 N. J. L. 632, and *Miller v. Delaware Transportation Co.*, *Id.* 700, these requests will not be considered.

Another ground of appeal is that the trial judge erred in denying appellants' motion for a nonsuit upon the opening made by the plaintiff's attorney. Although an objection was noted to the refusal of the court to nonsuit on that ground, the appellants' brief is silent upon the subject, and, therefore, it will be assumed that this ground of appeal has been abandoned.

A further ground of appeal is that the trial court refused to strike out the testimony of the plaintiff when he answered the question: "Q. Could he have seen you coming if he had looked?" "A. Oh, yes, he could." No objections appear to have been taken to the ruling of the court and, therefore, as already pointed out, the ruling will not be considered.

The only other ground of appeal is directed to this language used by the trial judge in his charge: "It is very difficult for me to feel that there was no negligence; a car coming along at a fair rate of speed, and turning a corner sharp, as he puts it, and a collision."

Counsel for appellants contends that this was an error, in that the court invaded the province of the jury by deciding a question of fact in issue. But this excerpt does not represent all that the trial judge said in this connection. For he, in continuation of what has just been quoted, said: "He looked while some distance down the street, but did not look apparently as he came closer to the corner. But it is for you to say from all the evidence whether this driver, Knauss, was negligent or whether he was not."

It was not error for the trial judge to give his opinion of the impression that the testimony made upon his mind so long as he left the decision of the questions of fact involved in the case to the jury. *Castner v. Slikor*, 33 N. J. L. 507; *State v. Hummer*, 73 Id. 714.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

90 N. J. L. Colletto v. Hudson & Manhattan R. R. Co.

JOSEPH COLLETTA, RESPONDENT, v. HUDSON AND MANHATTAN RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"The plaintiff's case shows that he was a passenger on the defendant's car; that the car was so crowded that there were no seats to be had, and he was standing near the door.

"As the car approached a station the guard opened the door, and, as the car was passing around a curve in the track, the plaintiff was thrown off his balance, and in order to save himself from falling, put his hand against the jamb of the door, and that closing, because of the swing of the train, his hand was caught and the injuries produced for which this suit was brought. The testimony shows that these doors slide in a groove in the sides of the car, and that when in place there is a catch which will hold the door so that it will not move because of any ordinary motion of the train. It further appeared that this car was examined the next day and the lock or catch was found to be in good order, and the uncontradicted testimony is that if the door had been pushed far enough open, it would have been locked in that position. The plaintiff has a judgment, from which the defendant has appealed because the trial court refused to nonsuit or to direct a verdict for it.

"The first point argued is, that the nonsuit should have been granted for want of proof of negligence on the part of the defendant, because, as it is argued, there is no proof of any extraordinary jerk or lurch of the car, and that the door closed because such a thing was likely to happen if the door was not properly locked. We think it may properly be inferred from the testimony that unless fastened the door was liable to close when the car was running around a curve, even if there was no unusual lurch, and that to prevent this the

Colletto v. Hudson & Manhattan R. R. Co. 90 N. J. L.

defendant company had provided the car with a lock or catch to hold the door in place, and that this accident occurred because the guard neglected to properly fasten the door.

"We think the case was open to a finding that the negligence of the defendant was in failing to throw the door far enough open so that the lock would hold it in place, and that with knowledge to be imputed to it that the door would not stay in place during ordinary operation unless it was properly held by the latch; the duty arose to so fasten the door as to prevent its movement during ordinary operation of the car.

"The appellant cited two cases which we think not applicable, viz., *Hannon v. Boston Railroad Co.*, 65 N. E. Rep. 809, where the passenger was inside of the car as it drew up to the platform and put his hand on the glass of the door so that when it was opened by the guard standing on the station platform, the plaintiff's hand was caught, and in *Cashman v. New York, New Haven and Hartford Railroad Co.*, 87 Id. 570, where the plaintiff's hand was pushed between the door and the jamb of an elevator as the guard was closing. In both of these cases the act of the plaintiff in putting his hand in a dangerous place was the proximate cause of the accident, while, in the present case, the negligence of the defendant was in not properly fastening the door which he knew was required to be held in place when the train was moving around a curve. We think the trial judge properly refused both motions.

"The second point is, that the plaintiff was guilty of contributory negligence as a matter of law. To this we cannot accede, for, according to the plaintiff's case, the car was crowded with passengers and he was required to stand near the door, and, because he was in such a position, it became necessary, on account of the sudden motion of the car, to steady himself, and he had a right to assume that the door was properly fastened, and if it was, what he did was perfectly safe.

"The judgment should be affirmed."

90 N. J. L.

DeGross v. O'Connor.

For the appellant, *Collins & Corbin*.

For the respondent, *David F. Edwards*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 10.

For reversal—None.

JESSE V. DEGROSS, APPELLANT, v. JOHN R. O'CONNOR.
RESPONDENT.

Argued November 29, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"The allegations in this case involves the title to the office of superintendent of weights and measures for Bergen county. The relator claims to be entitled to it by virtue of an appointment made by the board of chosen freeholders of the county on the 13th of April, 1913, and that as an exempt fireman he was entitled to hold the office during good behavior. The respondent's claim to the office rests upon an appointment by the board of freeholders of the county, which organized on the 3d of January, 1916, under the act of 1912, known as the Small Board of Freeholders act.

"The case of *Earle v. Durham*, 89 N. J. L. 4, decided at the present term, is identical in its legal essence with that now under consideration, and for the reasons stated in the

opinion delivered in that case, the present respondent is entitled to judgment on the demurrer to the plea."

For the appellant, *Thomas F. McCran*.

For the respondent, *Clarence Mabie*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

JAMES DEVLIN ET AL., APPELLANTS, v. MAYOR, ETC., OF
JERSEY CITY ET AL., RESPONDENTS.

Argued November 24, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"We think the contract must be treated as a single contract for repairs to various streets. In such a contract much must necessarily be left to the judgment of the city authorities, such as the streets to be paved. No doubt this opens the door to favoritism, but we have no right to assume that the selection of the streets to be repaired at any particular time will be governed by any consideration except the public need.

"The extent of the obligation under the maintenance bond will depend on the amount of work done, and we see no valid objection on this score. All bidders seem to have had the same chance.

90 N. J. L.Earle v. Durham.

"In repair work of this kind it is probably impossible to state accurately all the work that may be required, such as the depth of binder on the asphalt pavements and the grade to which the bituminous concrete pavement is to be brought.

"We think the conditions on which bidders were required to bid were stated as definitely as was probably practicable and that there should be judgment for the defendants."

For the respondents, *J. Emil Walscheid*.

For the appellants, *Collins & Corbin*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, BLACK, WILLIAMS, JJ. 7.

For reversal—PARKER, WHITE, GARDNER, JJ. 3.

RALPH D. EARLE, JR., APPELLANT, v. HENRY W. DURHAM
RESPONDENT.

Argued November 23, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 4.

For the appellant, *Gilbert Collins*.

For the respondent, *John R. Hardin* (*Waldron M. Ward* on the brief).

Earle v. Durham.90 N. J. L.

PER CURIAM.

The judgment of the Supreme Court will be affirmed, for the reasons given in the opinion of Chief Justice Gummere in that court upon the points therein considered.

Counsel for appellant claims that the Supreme Court did not discuss all the points made before them. We find on the brief two points not treated below. One is the sufficiency, in a constitutional sense, of the title of the "Small Board of Freeholders act." *Pamph. L.* 1909, p. 294; *Pamph. L.* 1912, p. 619. The other is that the revised Road act of 1912 (*Pamph. L.*, p. 809), which was passed later than the Small Board act of that year, impliedly repeals it as respects the office now in question.

We conceive that neither of these questions is raised by the record. The information sets up merely that the provisions of section 6 of chapter 355 of the laws of 1912 had and have no applicability to the office of county engineer of the county of Bergen, &c. This is repeated in the statement of the case in appellant's brief. It would be sufficient to rest on this answer but for the importance of the legislation.

The argument as to the title of the act runs counter to our holding in *Patterson v. Close*, 84 N. J. L. 319. It is claimed that that holding was *dictum*. But if so, it was uttered deliberately, and no doubt in view of the importance of setting the sufficiency of the title at rest. We are content to follow it now, without regard to the fact that on the present record our decision on this point may also be called *dictum*.

As to the other point the answer is, that during a course of many years, the Road act and the Small Board act have remained on the statute books side by side, each altered from time to time by the legislature, and treated substantially as interlocking legislation. We read a clear legislative intent that the fundamental purpose and effect of the Small Board act are to be unimpaired by any incidental changes in the Road act; and hence, that the provision for vacating the offices is not superseded by anything in the Road act relating to the appointment and term of office of the county engineer.

90 N. J. L.

Gilbert v. Penna. R. R. Co.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

DANIEL H. GILBERT, RESPONDENT, v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey* (John A. Hartpence on the brief).

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

VOL. XC.

21

Heckman v. Cohen.

90 N. J. L.

ADAM HECKMAN, RESPONDENT, v. ABRAHAM COHEN,
APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, in which court the following *per curiam* was filed:

"This is an appeal from a judgment rendered against the appellant in favor of the appellee in the Orange District Court, for the sum of \$192.66 and costs. The case was tried by the court, sitting without a jury.

"The appellant urges three grounds of reversal of the judgment—*first*, the refusal of the trial court to grant a motion for a nonsuit; *second*, the refusal of the trial judge to find for the defendant; *third*, that the court improperly allowed punitive damages.

"We think the motions for a nonsuit and to find for the defendant were properly refused. This is a case where a person while crossing a public street in full view of the driver of an automobile for a distance of one hundred and fifty feet, was hit by the automobile and injured.

"The plaintiff drove a pie wagon. He stopped his wagon on the right side of Bowery street, in the middle of a block. There was an exit from the rear of the wagon, by means of a step, from which the plaintiff, according to his story, alighted, with fifteen pies piled on his left arm, and started on his way across the street to make delivery of the pies, when he was struck by the automobile.

"It appears that the automobile that struck the plaintiff was on the trolley tracks and directly behind a trolley car, which was proceeding in a westerly direction. The plaintiff testified that when he first saw the automobile it was about one hundred feet away, and that he had walked from the rear of his wagon, the distance variously estimated at nine and fifteen feet, and had passed over one track and was just on the inside track when he was struck by the automobile.

90 N. J. L.

Heckman v. Cohen.

"For the appellant, the driver of the automobile testified that he was driving on the trolley tracks behind the trolley car at eight or ten miles an hour; that he saw the plaintiff leave the rear of his wagon and start across the street; that at that time the automobile was one hundred and fifty feet away; that he gave no signal of the approach of the automobile to warn the plaintiff. It further appears that the plaintiff was seventy years of age at the time of the accident. We think that it was a question of fact for the trial judge to determine whether the defendant, under the surrounding circumstances, by the exercise of reasonable care, could have avoided running into the aged plaintiff. The trial judge found that the defendant could have avoided the accident by the use of reasonable care. The speed at which the car was driven, under the surrounding circumstances, and the failure of the driver of the automobile to sound a warning to the aged plaintiff, were the basis of the court's finding that the defendant was negligent. We think the facts properly justified this inference. We also think that court was justified in finding that the plaintiff was not guilty of contributory negligence. The plaintiff had the right to reasonably expect that the driver of the automobile having the plaintiff in sight as he was crossing the street would have his car under control and would avoid running into him. The driver of the automobile could turn either to the right or left, and, therefore, the reason of the rule applicable to street railways which must proceed on the tracks is not applicable to wagons which may turn readily from their course in various directions.

"The reason urged for a reversal of the judgment that the trial judge awarded punitive damages is not sustained by the record in the case. The finding of the trial judge plainly shows that he awarded damages to the plaintiff for the pain, suffering and anguish which resulted to the plaintiff as a consequence of his injuries.

"The judgment will be affirmed, with costs."

For the appellant, *McDermott & Enright*.

For the respondent, *John A. Bernhard*.

Heckman v. Cohen.90 N. J. L.

PER CURIAM.

Heckman, the present respondent, recovered a judgment in the Orange District Court for personal injuries received from being run down by the defendant's automobile while crossing Bowery street, in the city of Newark, for the purpose of distributing pies to customers. He had stopped his wagon on the north side of the street, in the middle of the block, and was crossing over the south side with a dozen or more pies upon his arm when the accident occurred. The trial resulted in a judgment in his favor. The defendant, Cohen, then appealed to the Supreme Court, and the District Court judgment was there affirmed.

We concur in the views expressed by the Supreme Court in its opinion, and are satisfied to affirm upon that opinion. We observe, however, a slight inaccuracy in the statement of facts contained therein, viz., "that the automobile that struck the plaintiff was on the trolley tracks and directly behind a trolley car." We have discovered nothing in the testimony sent up with the appeal which discloses the presence of a trolley car upon the scene of the accident at the time of its occurrence. With this correction we adopt the opinion of the Supreme Court.

The judgment under review will be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L. Hendee v. Wildwood & Del. Bay R. R. Co.

WILLIAM C. HENDEE, ADMINISTRATOR, ETC., RESPONDENT, v. WILDWOOD AND DELAWARE BAY SHORT LINE RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 32.

For the respondent, *William C. French* and *Samuel T. French*.

For the appellant, *J. Fithian Tatem*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

KELLS MILL AND LUMBER COMPANY, INCORPORATED, RESPONDENT, v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Argued November 28, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 490.

Leib v. Penna. R. R. Co.90 N. J. L.

For the respondent, *Maximilian T. Rosenberg*.

For the appellant, *Vredenburg, Wall & Carey*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, J.J. 11.

For reversal—None.

J. C. LEIB, A CORPORATION, RESPONDENT, v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey (John A. Hartpence on the brief)*.

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

90 N. J. L.

Loewenthal v. Penna. R. R. Co.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

ISAAC LOEWENTHAL, RESPONDENT, v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey* (John A. Hartpence on the brief).

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

Moriarity v. Orange.90 N. J. L.

JAMES D. MORIARITY, APPELLANT, v. BOARD OF COMMISSIONERS OF THE CITY OF ORANGE, RESPONDENT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 385.

For the appellant, *George W. Anderson*.

For the respondent, *Arthur B. Seymour*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

OLIVIT BROTHERS, A CORPORATION, RESPONDENT, v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey (John A. Hartpence on the brief)*.

90 N. J. L.Olivit Brothers v. Penna. R. R. Co.

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

OLIVIT BROTHERS, A CORPORATION, RESPONDENT, v.
THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey* (John A. Hartpence on the brief).

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

Olivit Brothers v. Penna. R. R. Co.90 N. J. L.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

OLIVIT BROTHERS, A CORPORATION, RESPONDENT, v.
THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey* (John A. Hartpence on the brief).

For the respondent, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

90 N. J. L. Opportunity Sales Co. v. Edwards, Comptroller.

OPPORTUNITY SALES COMPANY, APPELLANT, v. EDWARD I. EDWARDS, COMPTROLLER OF THE TREASURY, AND THOMAS F. MARTIN, SECRETARY OF STATE, RESPONDENTS.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the respondents, *John W. Wescott*, attorney-general.

For the appellant, *McDermott & Enright*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the *per curiam* of this court in *American Woolen Co. v. Edward I. Edwards et al.*, No. 121 of this term (*ante p. 293*).

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 13.

For reversal—None.

PEOPLES BANK AND TRUST COMPANY, APPELLANT, v. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF PASSAIC, RESPONDENT.

Submitted July 10, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

Rabinowitz v. Vulcan Insurance Co.90 N. J. L.

For the appellant, *Humphreys & Sumner*.

For the respondent, *Fred W. Van Blarcom*.

PER CURIAM.

The judgment of the Supreme Court is affirmed, for the reasons given in the case of *Peoples Bank and Trust Co. v. Passaic County Board of Taxation*, decided at this term (*ante* p. 171).

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, WILLIAMS, GARDNER, JJ. 10.

For reversal—HEPPENHEIMER, J. 1.

DAVID RABINOWITZ, RESPONDENT, v. VULCAN INSURANCE COMPANY, APPELLANT.

Argued November 29, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“This action was brought on a policy of insurance issued to the plaintiff by the defendant company against, among other things, loss by theft or robbery, the basis of the action being a loss by theft or robbery. The plaintiff had a verdict and the defendant appeals. The loss by theft is not contested, but the defendant claims that it was entitled to have allowed by the trial court its motion for nonsuit upon the ground that in the application for the insurance, and in the proof of loss the machine is described as a new one, whereas the defendant claims that this was false, and therefore the plaintiff was not entitled to recover.

"The trial court found that the car was insured by the defendant company and that it had been purchased by one Van Horne for the plaintiff, the car to become the property of the plaintiff as soon as paid for; that two or three months after the purchase the policy was taken out by the plaintiff upon the car which was then his property, and that in his application he stated that the car was new. He also found that Van Horne, when the policy of insurance was applied for, he being the agent of the defendant company, had as much knowledge of the fact as the plaintiff; that whether the car was a new one or not was a question of fact; that there was no representation by the plaintiff which was not known to the defendant company, and thereupon gave judgment for the plaintiff. At the argument the court allowed a rule on the trial court whether the car was a new one, and in compliance with that order he certified that the testimony disclosed that the automobile was purchased in the month of January, 1915, by Van Horne, who was the employer of the plaintiff, and that Van Horne testified the auto was purchased by him with the intention of turning it over to the plaintiff as soon as the latter had earned sufficient funds to pay for it; that in the month of March following the plaintiff earned such amount and that the automobile was then turned over to the plaintiff. After this statement the trial court certified: 'Of course, from the testimony produced before me, the car was an old one, having been purchased from the manufacturers by Van Horne, a license being issued in his name, and, subsequently, the title passed from him to the plaintiff at least two months after the purchase by Van Horne.'

"The application contained this question and answer: 'Q. Was the automobile new or second hand when purchased by the present owner? A. New.' It is so described in the proof of loss, but it is not so described in the policy. The policy bears date June 25th, 1915, and the year in which it was built is put down as 1915. We think the trial court was in error when it based the judgment for the plaintiff upon the theory that the agent of the defendant had full knowledge of the fact concerning the age of the machine because there is no

Rabinowitz v. Vulcan Insurance Co.90 N. J. L.

proof in this case that Van Horne was authorized in writing to be the agent of the defendant company. On the other hand, we think the trial court was not justified in finding that the car was not a new one within the meaning of the policy of insurance. The car was new in January, 1915; it was bought by Van Horne for the plaintiff and the title remained in Van Horne until about the 1st of March, when the plaintiff was able to pay for the machine. The undisputed facts are that plaintiff needed a car for use in the real estate business of Van Horne, by whom he was employed, and his employer, having a trading account with a dealer in automobiles, and having also an open credit account with the plaintiff, bought the car for him and kept it in his, Van Horne's, garage, and turned it over to him when his credits amounted to the cost. This amounted to a purchase for plaintiff as much as if the credit had been given to him directly by the seller.

"We think the machine was new within the meaning of the policy, and that therefore the judgment should be affirmed, but not for the reasons given by the trial court."

For the appellant, *William E. Blackman*.

For the respondent, *Hershenstein & Finnerty*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 10.

For reversal — None.

90 N. J. L.Ruby v. Freeholders of Hudson.

**EMORY R. RUBY ET AL., RESPONDENTS, v. FREEHOLDERS
OF HUDSON COUNTY ET AL., APPELLANTS.**

**JOHN T. KENNEDY, RESPONDENT, v. FREEHOLDERS OF
HUDSON COUNTY ET AL., APPELLANTS.**

Argued November 23, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 481.

For the appellants, *William Baker, Inc., Marshall Van Winkle* (*Warren Dixon* on the brief).

For the respondents, *Gilbert Collins* and *Edward A. Markley*.

PER CURIAM.

The judgment of the Supreme Court should be affirmed, for the reasons given in the opinion of Mr. Justice Trenchard in the first of the above cases in that court.

Appellant Baker makes the additional point, not discussed by the Supreme Court, that the retention of his certified check deposited as a guarantee, when the checks of all other competing bidders were returned to them, amounted in law to an acceptance of the Baker bid and bound the county to proceed with the contract. We cannot take this view. The retention of Baker's check went with the resolution purporting, by a vote of six to three, to award him the contract, and certainly gave that attempt no additional efficacy. The fact that by consent of parties, or misapprehension of the correctness of the legal situation, the check remained with the freeholders, conferred no rights on the bidder except to have the check back.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

Sickler v. Tuckahoe National Bank.90 N. J. L.

JOSEPH T. SICKLER, RESPONDENT, v. TUCKAHOE NATIONAL BANK, IMPEADED, ETC., APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court.

For the appellant, *David O. Watkins*.For the respondent, *Joseph J. Summerill*.**PER CURIAM.**

The respondent sued the appellant, the Tuckahoe National Bank, impleaded as defendant with Lilbern M. Hess, for \$500, with interest. Hess, as agent for the bank, agreed with Annie J. Sickler that the bank would convey to her a certain hotel property, with the furniture in a certain other hotel, and certain bonds of an improvement company, and would cause to be conveyed to John R. Sickler, her husband, the stock of wines and liquors in the last-mentioned hotel, and would cause to be transferred to him a certain license to keep an inn or tavern, all for \$23,000, of which sum \$500 was to be paid forthwith, the sum of \$3,500 on a certain later day, the sum of \$1,000 when the license was transferred, making a total cash payment of \$5,000, the balance to be secured by a mortgage on the hotel property to be conveyed to her. Mrs. Sickler paid the \$500 to Hess, as agent for the bank, and received a receipt therefor. The agreement not having been performed, she subsequently assigned her claim against the bank growing out of the transaction to the respondent, who brought suit thereon, averring that he had no knowledge as to whether the bank authorized Hess to make the agreement, or whether Hess ever paid the \$500 to the bank, but that Hess, acting for the bank, had repudiated the agreement and refused to comply with its terms. He demanded of the bank, or, in the alternative, Hess, the sum of \$500, so paid on account of the agreement, with interest. The case came on to be heard in

90 N. J. L.

Sickler v. Tuckahoe National Bank.

the Gloucester County Circuit Court before Judge Carrow and a jury, and resulted in a verdict in favor of Joseph T. Sickler, the respondent, and against the Tuckahoe National Bank, appellant, upon which judgment was duly entered. From this judgment the bank has appealed upon the sole ground that the trial judge refused to nonsuit the plaintiff at the close of his case.

When the plaintiff rested there was testimony to the effect that Hess, after the agreement was made, demanded \$6,500 in cash instead of the \$5,000 stipulated, making an additional cash payment of \$1,500, and that he had refused to have the property conveyed and the license transferred, as required by the agreement. The Sicklers, although they went into possession of the hotel to be conveyed, vacated it and were not in possession at the time of the break.

While there does not appear to have been competent proof of Hess' agency for the bank on the plaintiff's case, that question was not raised, but, on the contrary, such agency was practically conceded by counsel for the defendant on the argument of the motion to nonsuit.

As there was evidence to go to the jury at the close of the plaintiff's case, to the effect that the defendant bank, through its agent, had varied the terms of the agreement, and therefore excused performance by the plaintiff's assignor, the denial of the motion to nonsuit was right, and the judgment will therefore be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

VOL. XC.

22

Spada v. Penna. R. R. Co.90 N. J. L.

ANDREW SPADA ET AL., PARTNERS, ETC., RESPONDENTS,
v. THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Hudson County Circuit Court.

For the appellant, *Vredenburg, Wall & Carey (John A. Hartpence on the brief)*.

For the respondents, *Queen & Stout*.

PER CURIAM.

The questions raised on this appeal are determined, in effect, by the principles laid down by this court in *Carr v. Pennsylvania Railroad Co.*, 88 N. J. L. 235.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 14.

For reversal—None.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. MORRIS HOFFMAN, PLAINTIFF IN ERROR.

Submitted December 11, 1916—Decided March 5, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

90 N. J. L.State v. Hoffman.

"The defendant was convicted of receiving stolen goods and seeks to review by writ of error alone.

"The first point is, that the conviction rests alone upon the unconfirmed testimony of three boys who stole and sold brass auto lamps to defendant. It is not necessary to consider the legal effect of this because it is not raised by any exception. It goes to the legal effect of the testimony and there was no motion for direction or request to charge which raised this question. But if the record did raise the question, it has been disposed of contrary to the contention of plaintiff in error in *State v. Rachman*, 68 N. J. L. 120.

"The next point is, that the court charged the jury that 'every effort should be made to stamp out such practice.' This is an excerpt from that part of the charge which refers to the practice of buying goods that have been stolen from boys, but it was said 'without regard to the guilt or innocence of the defendant.' It was perhaps not happy, but that does not make it error.

"The third point is, refusal to charge that if the defendant did not know the brass was stolen, then he could not be convicted, and that the state must prove that the goods were stolen and that defendant knew or had reason to believe that they were. The court did charge this in explicit terms.

"The fourth point is the same as the second and refers to comments upon the evils of buying stolen goods.

"The last alleged error is refusal to charge 'that if defendant purchased the lamps which were smashed up and the defendant having no knowledge that they were stolen,' he must be acquitted. The court did charge all of this that defendant was entitled to have charged.

"The judgment will be affirmed."

For the defendant in error, *Jacob L. Newman*.

For the plaintiff in error, *Charles Hood*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

State v. Lehigh Valley R. R. Co.

90 N. J. L.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 12.

For reversal—None.

THE STATE, DEFENDANT IN ERROR, v. LEHIGH VALLEY
RAILROAD COMPANY, PLAINTIFF IN ERROR.

Argued November 22, 1916—Decided March 5, 1917.

On error to the Supreme Court, whose opinion is reported in 89 N. J. L. 48.

For the plaintiff in error, *Charles B. Bradley*.

For the state, *Charlton A. Reed*, prosecutor of the pleas.

PER CURIAM.

We conclude that the judgment brought up should be affirmed, substantially for the reasons given in the opinion of Mr. Justice Swayze in the Supreme Court.

We are not called upon to decide as between the present plaintiff in error and its lessor, the Morris Canal Company, which one is bound under the contractual relations existing between them, to bear the expense of maintaining bridges across the canal. In the case of *Ryerson v. Morris Canal Co.*, 71 N. J. L. 381, relied on by counsel and discussed in the opinion below, the question was whether by the act of leasing under express legislative authority, the canal company could "transfer * * * the duty of maintaining the bridges," and this was properly decided in the negative; but the question whether by leasing in perpetuity and taking complete possession of all the property and franchises of the canal company, the lessee, had as between itself and the state assumed

90 N. J. L.State v. Di Maria.

equally with the canal company the duty of maintaining those bridges, was not involved and was not decided.

We agree with the conclusion of the Supreme Court that the lessee took *cum onere*, and, consequently, was laid under the same duty toward the state and the public, respecting bridges, as its lessor. This makes it unnecessary to rely on the point suggested by the court below, that the bridge in question would be a nuisance if unauthorized by statute and so built as to obstruct the highway. This is challenged as not supported by any allegation in the indictment. For the purposes of this decision we disregard it and express no opinion thereon.

The judgment is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. NUNZIO DI MARIA, PLAINTIFF IN ERROR.

Submitted December 11, 1916—Decided March 5, 1917.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 416.

For the defendant in error, *Robert S. Hudspeth*.

For the plaintiff in error, *Alexander Simpson*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Chief Justice Gummere in the Supreme Court.

State v. Nones.

90 N. J. L.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
CHARLES A. NONES, PLAINTIFF IN ERROR.

Argued November 21, 1916—Decided March 5, 1917.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 460.

For the defendant in error, *Jacob L. Newman*.

For the plaintiff in error, *Borden D. Whiting*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Chief Justice Gummere in the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L.State v. Serritella.

THE STATE, DEFENDANT IN ERROR, v. JOSEPH SERRITELLA, PLAINTIFF IN ERROR.

Submitted December 11, 1916—Decided March 5, 1917.

On error to the Supreme Court, whose opinion is reported in 89 N. J. L. 127.

For the plaintiff in error, *Frank M. McDermit*.

For the state, *Jacob L. Newman*, prosecutor of the pleas, . and *Andrew Van Blarcom*, assistant prosecutor.

PER CURIAM.

The judgment of the Supreme Court should be affirmed, for the reasons given in the opinion of Mr. Justice Bergen in that court, except as to the point herein discussed.

The trial judge charged that one of the witnesses, a small boy, was "corroborated by one of the other boys, who says," &c. Upon the review in the Supreme Court on strict writ of error, and also under section 136 of the Criminal Procedure act, it was urged that the testimony adverted to was not corroborative, and the Supreme Court held that it was. We find ourselves unable to concur with the Supreme Court on this point, but this does not work a reversal. The language used is only comment on the evidence. If it were a statement of a fundamental fact as having been proved, and were erroneous and properly made the foundation of a review, it would probably lead to a reversal, as in *Smith & Bennett v. State*, 41 N. J. L. 370; but if merely comment not binding on the jury, and whose error in fact is not pointed out to the court, it will not avail the defendant even under section 136. *State v. Kroll*, 87 Id. 330, 331; *State v. Lovell*, 88 Id. 353. The record does not show that the attention of the court was in any way drawn to this misrecital of the testimony, of whose inaccuracy the jury were quite competent to judge.

The judgment is affirmed.

Whittingham v. Millburn Twp.90 N. J. L.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPFENHEIMER, WILLIAMS, GARDNER, JJ. 11.

For reversal—None.

ELIZABETH WHITTINGHAM, APPELLANT, v. TOWNSHIP
OF MILLBURN ET AL., RESPONDENTS.

Argued November 29, 1916—Decided December 5, 1916.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"Two ordinances, one to change the grade of Wyoming avenue, in the township of Millburn, and the other to widen the same avenue, have been brought up for review by separate writs of *certiorari*.

"The prosecutrix owns lands adjoining the avenue. Her status to prosecute the writs is not questioned.

"It is conceded that the ordinances are intended to accomplish part of a general scheme of abolishing certain grade crossings of the Delaware, Lackawanna and Western Railroad Company, one of the defendants.

"The township of Millburn entered into an agreement with the Delaware, Lackawanna and Western Railroad Company, providing, among other things, for the elimination of the grade crossing of Wyoming avenue, by raising it above the level of the tracks and crossing the railroad on a bridge.

"This contract was made September 20th, 1915, pursuant to the authority conferred by section 30 of an act entitled 'An act concerning railroads,' Revision of 1903 (*Pamph. L.*, p. 645; 3 *Comp. Stat.*, p. 4234, amended by chapter 57 of the laws of 1915). *Pamph. L.*, p. 98. ♦

"The first point made by counsel for prosecutrix is, that

90 N. J. L.

Whittingham v. Millburn Twp.

the ordinances should be set aside because they are a part of a general illegal scheme. The general ground upon which this assertion is rested is that the township of Millburn does not come within the operation of the act of 1903 as amended.

"It is argued under this head that because the act of 1903 uses the phraseology 'municipality or township,' that it was intended to include all municipalities above the dignity of townships; that because in the amendment of 1915 of the act of 1903, the word 'township' was wiped out and the word 'municipality' only was allowed to remain, it was the plain intention of the legislature by the use of the word 'municipality' to exclude townships and only to include every political division of a higher rank than township, and that being so, the township of Millburn is excluded and therefore had no power to enter into the contract with the railroad company, and as a consequence the ordinances being a part of the scheme to effectuate the purposes of the contract are illegal and should be set aside. There is no substance to this contention. We think the legislature, by the amendment of 1915, clearly intended by the elimination of the word 'township' from the act and leaving therein the word 'municipality' to broaden the application of the act of 1903, to every municipality in which the condition described by the act existed, without regard to whether such a municipality is a city, town, township, borough, or the like.

"One of the primary objects expressed in the act and which the act seeks to accomplish is 'greater safety to persons and property.'

"We do not think it would be a reasonable construction of the act to hold that the legislature intended to protect the lives and property of those who inhabited municipalities which are termed cities and to leave the lives or property of those who inhabited municipalities which are not so denominated unprotected.

"When it is considered that there are eighty-five cities, towns and boroughs in this state each of which has a population of less than one thousand, and that there are twenty-two townships each of which has more than five thousand inhabit-

Whittingham v. Millburn Twp.

90 N. J. L.

ants, and some of which have more than ten thousand inhabitants and as high as twenty thousand, it would easily be giving an absurd effect to the act by excluding from its operation townships which are by far more populous and in need of the power conferred by this legislation than are municipalities which are styled cities. We conclude, therefore, that the township of Millburn had the power to make the contract, and possessing that power it was authorized to effectuate the purpose of such contract by passing the ordinances assailed.

"It appears that the ordinance to change the grade of Wyoming avenue was passed on final passage on February 21st, 1916, and the ordinance to widen the same was passed April 17th, 1916. The writs were not applied for until May 27th, 1916, and under the ninety-third section of the Township act (4 *Comp. Stat.*, p. 5609), the application was made too late. The section referred to forbids either *certiorari* or injunction to set aside any ordinance or resolution for any public improvement, &c., after thirty days have elapsed from the date of the adoption of the resolution or ordinance.

"We think, therefore, that the only question that we can properly consider is the attack made upon the constitutionality of the grade crossing elimination scheme contained in the General Railroad act. The precise point made in this regard being that section 30 of the Railroad act is unconstitutional, in so far as it attempts to enlarge the powers of municipalities.

"It does not appear that the constitutionality of this section has ever been challenged, but, on the contrary, it does appear that its effectiveness has been uniformly recognized by the courts of this state for almost fifty years.

"Besides all this, we think that the ground upon which this section is attacked is untenable. The subject-matter dealt with in section 30 of the Railroad act is cognate to the use and operation of railroads which necessarily cross public highways, &c. The scheme of the section is to permit railroads to make contracts with municipalities in regard to the use of public highways and this is clearly germane to the operation of railroads.

90 N. J. L.

Whittingham v. Millburn Twp.

"Another point urged by counsel for the prosecutrix is that the ordinance did not receive the unanimous vote which under the act of 1899 (4 *Comp. Stat.*, p. 5579) is required where the change of the grade of highway is the design.

"We think that this has reference only to improvements made in the usual course of development of such municipalities. The Railroad act contains no such provision. It provides that the municipal authorities may enter into contracts with railroad companies to secure the abolition of grade crossings. We think this power, inferentially, is to be exercised on the principle of a majority rule.

"Lastly, it is urged that the powers conferred on the township in making the agreement with the railroad company, were limited to the elimination of the grade crossings, and did not authorize the widening of the avenue. The answer to this objection is that if it became necessary, in order to eliminate the grade crossings, that the avenue should be widened, it was proper exercise of power.

"The writs will be dismissed and the proceedings affirmed, with costs."

For the appellant, *Cortlandt & Wayne Parker* and *John O. Bigelow*.

For the respondent township of Millburn, *Jerome T. Congleton*.

For the respondent Delaware, Lackawanna and Western Railroad Company, *Walter J. Larrabee*:

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 9.

For reversal—PARKER, BERGEN, JJ. 2.

Whittingham v. Millburn Twp.

90 N. J. L.

ELIZABETH WHITTINGHAM, APPELLANT, v. TOWNSHIP
OF MILLBURN ET AL., RESPONDENTS.

Argued November 29, 1916—Decided December 5, 1916.

On appeal from the Supreme Court.

For the appellant, *Cortlandt & Wayne Parker* and *John O. Bigelow*.

For the respondent township of Millburn, *Jerome T. Congleton*.

For the respondent Delaware, Lackawanna and Western Railroad Company, *Walter J. Larrabee*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in *Whittingham v. Township of Millburn et al.*, No. 125, present term of this court, *ante p.* 344.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, TRENCHARD, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 9.

For reversal—PARKER, BERGEN, JJ. 2.

CASES DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW JERSEY.

JUNE TERM, 1917.

ALFRED H. ELLIS, ADMINISTRATOR, RESPONDENT, v. THE
PENNSYLVANIA RAILROAD COMPANY, PROSECUTOR.

Submitted May 28, 1917—Decided June 28, 1917.

In an action brought by an administrator under the "Death act" a motion to *non pros.*, if granted, is without costs against the plaintiff. The case of *Kinney, Administrator, v. Central Railroad Co.*, 34 N. J. L. 273, followed.

On motion to *non pros.*

Before Justices GARRISON, PARKER and BERGEN.

For the motion, *John A. Hartpence.*

Contra, Warren Dixon.

The opinion of the court was delivered by

GARRISON, J. This is a motion for *non pros.*, and for the allowance of costs in favor of defendant against the plaintiff, who is an administrator suing under the "Death act." The

Malone v. Erie Railroad Co.90 N. J. L.

court granted the *non pros.*, but reserved the question of costs, with leave to defendant to submit a memorandum in support of the application therefor against the administrator, which has now been handed to the court.

In his memorandum counsel frankly admits that in the case of *Kinney v. Central Railroad Co.* (1870), 34 N. J. L. 273, this court decided that a defendant could not recover costs against an administrator in an action brought under the "Death act." He also admits that for nearly fifty years this rule has been applied in this court. He then argues with much force that the rule is wrong, for the reason that the administrator does not sue in the right of his intestate, but in the right of statutory beneficiaries. We express no opinion as to whether the original decision of this question was correct or not, for the reason that it is the judicial habit of this court under the circumstances now before us to follow its own previous decision, leaving it to the Court of Errors and Appeals to review the legal merits of such decision.

The rule of *non pros.* may be entered, without costs.

JAMES C. MALONE, APPELLANT, v. THE ERIE RAILROAD
COMPANY, RESPONDENT.

Submitted March 22, 1917—Decided June 1, 1917.

When a judge is trying a case with a jury, his opinion as to the sufficiency of the plaintiff's proofs, whether communicated to counsel or not, does not deprive the plaintiff of his right to submit to a voluntary nonsuit at any time before the jury has retired to consider its verdict or the judge has commenced to address the jury for the purpose of directing a verdict.

On appeal.

Before Justices GARRISON, PARKER and BERGEN.

90 N. J. L.

Malone v. Erie Railroad Co.

For the appellant, *Thomas J. Brogan*.

For the respondent, *Collins & Corbin*.

The opinion of the court was delivered by

GARRISON, J. This was an action for damages for the negligent transportation of skins whereby they heated and were in part spoiled.

A motion to direct a verdict was made during the argument, of which the court several times gave expression to a view of the case favorable to the granting of the motion, and when these expressions had reached a point that satisfied counsel for the plaintiff that in the view of the court his evidence was not sufficient to make a case for the jury, he said to the court that he would take a nonsuit. This right the court denied him, and after an exception had been taken to this ruling, the court addressed the jury and directed them to render a verdict for the defendant.

We think that it was error to deny the plaintiff's motion to submit to a voluntary nonsuit made before the jury had retired to consider its verdict and at a time when it had not been directed what verdict to render.

Section 160 of the Practice act takes away this right only "after the jury have gone from the bar to consider their verdict." This applies to District Courts. *Greenfield v. Cary*, 70 N. J. L. 613; *Ciesmelewski v. Domalewski*, ante p. 34.

In this latter case there was no jury and the judgment pronounced by the court was in effect after the consideration of its verdict.

Wolf Company v. Fulton Realty Co., 83 N. J. L. 344, was also a case tried without a jury, and the judge had begun to announce his decision, which, of course, assumed that the jury element in the court had considered its verdict.

Mr. Justice Swayze, in this case, said that the situation was closely analogous to one where the trial judge has directed the jury to render a verdict for the defendant, but the verdict has not in fact been rendered, in which situation the plaintiff has no right to submit to a nonsuit, citing *Dobkin v. Dittmers*, 76 N. J. L. 235.

The theory of this line of cases is that when the jury has been directed as to its verdict no consideration by the jury is contemplated, hence the offer to submit to a nonsuit comes too late. The essential feature of these decisions is the legal effect of a binding instruction delivered by the court to the jury. The attempt in the present case is to give to the opinion expressed by the judge to counsel during the argument of the defendant's motion for a direction the same effect that the cases cited give to a judicial direction to the jury to render a verdict for the defendant.

The confusion of these two totally different things loses sight of the fact that at common law where compulsory nonsuits were unknown voluntary nonsuits were based upon the communication to counsel of the judge's opinion adverse to the plaintiff. So far, therefore, from such a communication preventing the plaintiff's submission to a voluntary nonsuit it normally led to it.

In the early case of *Runyon v. Central Railroad Co.*, 25 N. J. L. 556, while our practice as to nonsuits was still in the making, this court said: "The counsel did, indeed, resist the motion below, and the question, whether the plaintiff had made a case which entitled him to recover, was fully argued; but after the court had given the opinion that the plaintiff ought to suffer a nonsuit, he did not insist upon his right to have the matter submitted to the jury. In such case the party is considered as, technically, suffering a voluntary nonsuit."

There is nothing in our judicial rule as to compulsory nonsuits that alters the common law right to submit to a voluntary nonsuit; if that right has been abridged it is by our statute, which preserves the right until the jury has retired to consider its verdict or some judicial action has been taken, the legal effect of which is to control the action of the jury.

It results, therefore, that when a judge is trying a case with a jury his opinion as to the sufficiency of the plaintiff's proofs, whether communicated to counsel or not, does not deprive the plaintiff of the right to submit to a voluntary nonsuit at any time before the jury has retired to consider its verdict or the court has addressed the jury for the purpose of directing its verdict.

90 N. J. L. Atl. Coast Elec. Ry. Co. v. State Bd. T. & A.

It may well be that when the judge has commenced to address the jury for the purpose of directing a verdict for the defendant, he cannot be interrupted by counsel for the plaintiff. That question does not arise in this case, where the court had not commenced to address the jury, but had expressed his opinion in a running colloquy with counsel.

Having reached the conclusion that there was legal error in the denial of the plaintiff's right to take a voluntary nonsuit, there must be a reversal of the judgment of the District Court and the award of a *venire de novo*.

ATLANTIC COAST ELECTRIC RAILWAY COMPANY, PROSECUTOR, v. STATE BOARD OF TAXES AND ASSESSMENTS, RESPONDENT.

Submitted March 22, 1917—Decided June 6, 1917

The act of 1906 (*Pamph. L.*, p. 644) requiring an annual franchise tax upon the annual gross receipts of any street railway corporation or upon such proportion of such gross receipts as the length of its line in this state upon any street, highway, road, lane or other public place bears to the length of its whole line, clearly requires that the tax should be calculated upon all gross receipts, irrespective of whether or not they are receipts for transportation, and was intended to provide a specific scheme for the taxation of the street railway corporations and to differentiate such corporations from corporations liable to the franchise tax under the act of 1903. *Pamph. L.*, p. 232.

On *certiorari* of taxes.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Durand, Ivins & Carlton*.

For the respondent, *John W. Wescott*, attorney-general.

Atl. Coast Elec. Ry. Co. v. State Bd. T. & A. 90 N. J. L.

The opinion of the court was delivered by

SWAYZE, J. The prosecutor was taxed under the act of 1906 (*Pamph. L.*, p. 644), upon gross receipts amounting to \$363,742.35. Of this amount \$67,752.55 was receipts from current and power delivered to the Atlantic Coast Electric Light Company. The prosecutor claims that this last amount should not be included in the gross receipts upon which the franchise tax is to be estimated. The language of the statute plainly requires an annual franchise tax upon the annual gross receipts of any street railway corporation or upon such proportion of such gross receipts as the length of its line in this state upon any street, highway, road, lane or other public place bears to the length of its whole line. The argument of the prosecutor is that although this language is clear, the tax should be computed only upon the gross receipts for transportation, because this was the rule under the act of 1903. *Pamph. L.*, p. 232. The answer is that the act of 1906 was intended to provide a specific scheme for the taxation of the street railway corporations and to differentiate such corporations from corporations liable to the franchise tax under the act of 1903. The legislature had before them the latter act and carefully omitted the words indicating that the tax should be calculated on receipts for transportation. No inference can be drawn from this omission except that the legislature meant that the tax should be imposed upon the total of the gross receipts in accordance with its precise language, which cannot be explained away by a mere guess at the possible intent to the contrary. This is borne out by the fact that under the act of 1900, which was the original Franchise Tax act for corporations of this character, a distinction was made between oil and pipe line corporations which were required to report gross receipts for transportation of oil and petroleum, and other corporations which were required only to report gross receipts. The act of 1900 was before this court in *Paterson and Passaic Gas Co. v. Board of Assessors*, 69 N. J. L. 116, and it was held that gross receipts included all gross receipts.

The tax is affirmed, with costs.

90 N. J. L.Benjamin & Johnes v. Brabban.

**BENJAMIN & JOHNES, PROSECUTOR, v. FLORENCE A.
BRABBAN, RESPONDENT.**

Argued June 7, 1917—Decided June 25, 1917.

1. A claim for compensation under the Workmen's Compensation act is barred by the lapse of one year from the date of the accident unless a petition is filed or an agreement for compensation payable under the act, is reached within such time. Neither the payment by the employer of the physician's bill for attendance during the first two weeks of disability nor an agreement that there shall be "no compensation" can properly be called an agreement such as may be reviewed by the Court of Common Pleas, under the authority of paragraph 21 of the act, on the ground that the incapacity of the injured employe has subsequently increased or diminished.
2. A case under the Workmen's Compensation act, solemnly adjudicated on a petition and agreed statement of facts, should not be reopened for the purpose of allowing a party to make a new and distinct case.

On *certiorari* to the Essex Pleas.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *M. Casewell Heine*.

For the defendant, *Wilbur A. Heisley*.

The opinion of the court was delivered by

SWAYZE, J. Florence M. Brabban was injured on May 1st, 1913, while in the employ of Benjamin & Johnes. On April 30th, 1915, nearly two years afterward, she filed a petition in the Essex Common Pleas setting up that there was a dispute between her and the present prosecutor concerning her claim for compensation and praying that that dispute might be determined in accordance with the act. To this petition an answer was filed claiming that her right was barred by the lapse of the year allowed by the statute, and obviously this defence was valid. Thereupon, on June 16th, 1915, she filed an

Benjamin & Johnes v. Brabban.

90 N. J. L.

amended petition in which she stated that about two weeks after the accident an agreement was entered into between her and the prosecutor by which it was understood and agreed "that the petitioner should receive no compensation for the injury which she sustained by reason of the fact that she had returned to her employment on the sixteenth day after the occurrence;" that in November, 1914, she discovered that her incapacity had increased and she therefore requested the court to review the agreement and to adjudge compensation to her under the act. This petition came on for hearing upon an agreed state of facts which recited that on the sixteenth day after the accident she returned to work, and on the same day, had a conversation with one of the members of the respondent corporation, during which she asked for compensation and was told that as she had returned shortly after the lapse of two weeks she was entitled to no compensation under the law, but was advised to see a lawyer; that she consulted counsel and was advised that she could recover nothing; that she again saw the same member of the respondent corporation and told him that she acquiesced in his interpretation of the law, and said that she was satisfied that she was entitled to no compensation, and if satisfactory to the respondent would continue to work there; and that she did so continue working until the month of November, 1914. The judge held, on this state of facts, that he could find no agreement such as contemplated by the language of the last paragraph of section 21 or the last paragraph of section 23, and that the petition would be dismissed.

On November 13th, 1915, Miss Brabban filed a second amended petition in which she recited that two weeks after the accident an agreement was entered into between her and the prosecutor, in which it was agreed that the prosecutor should pay or reimburse her for the amount she had become indebted to a physician for medical attendance made necessary by the accident. The petition states that more than one year had elapsed since the agreement became operative; that the statement in her former petition that it was agreed that she should receive no compensation for the injury was made

by inadvertence and mistake and without the knowledge of the petitioner (although it was sworn to). She prayed that the agreement be reviewed. Thereupon the judge set aside his former judgment, reheard the case, held that the agreement to pay the physician's bill was an agreement for compensation and that he had the right to review it. He did review it and awarded her \$5.50 a week for four hundred weeks.

Obviously, she could not recover under any of these petitions as an original petition for compensation under the act, for they were all filed more than a year after the injury. The only ground on which the proceedings can be sustained is that there had been an agreement for compensation between the parties within a year after the accident, and that this agreement might be reviewed under section 21 of the act on the ground that her incapacity had increased. The difficulty with this claim of the petitioner is that it is necessary that there should have been an agreement upon the "compensation payable under the act," which shall be subject to diminution as well as to increase. The payment of the physician's bill required no agreement, as the present prosecutor was under an obligation to pay that bill under section 14 of the statute, without any agreement. It is very doubtful, we think, whether the opinion of the learned judge of the Common Pleas that the physician's bill was compensation is sound, but whether so or not the payment of the physician's bill required no agreement and would not be subject to review; it is only where there is an agreement that there can be a review after the year and a case where there is an agreement is contrasted by the statute with a case where there is a dispute. The provision is clearly not applicable to a case like this. To call an agreement that there should be "no compensation" an agreement for compensation under the act, is a mere perversion of language.

Force is added to this view by the very fact stated in the first amended petition that the agreement was that the petitioner should receive no compensation for the injury which she had sustained by reason of the fact that she had returned to her employment on the sixteenth day after the injury. Ob-

Freeman v. Van Wagenen.

90 N. J. L.

viously, the petitioner then had in mind the provisions of section 13 of the act that no compensation should be allowed for the first two weeks after the injury is received, and as the trial judge said in his original opinion, the statement of facts which was agreed upon showed that there was no agreement such as was contemplated by sections 21 and 23. His adjudication on that petition and statement of facts was undoubtedly correct, and we think he ought not, after he had adjudicated the matter, to have allowed the case to be reopened for the purpose of making a new and different case in contradiction of the petitioner's own averments under oath. Such a procedure deprives the defendant of the protection which the statute intends to give him.

We pass by the questions as to the technical form of the procedure on which a rehearing was had, as we do not regard that as important, but it is important that a case solemnly adjudicated should not be reopened for the purpose of allowing a party to make a new and distinct case.

BART J. FREEMAN, RESPONDENT, v. GEORGE A. VAN
WAGENEN ET AL., APPELLANTS.

Submitted March 22, 1917—Decided June 6, 1917.

1. In a suit by a broker for commissions, alleged to be due for the procuring of a sale of real estate under a written agreement, where it was a disputed question whether the agreement had been abandoned by consent, such a question was a proper one for the jury.
2. In the absence of a special agreement, a real estate broker, acting by virtue of a written agreement, earns his commission when he secures a ready and willing purchaser, brings the parties together and gets them to make a binding agreement.

On appeal from the Essex Circuit.

Before Justices SWAYZE, MINTURN and KALISCH.

For the appellants, *William K. Flanagan*.

For the respondent, *Edwin C. Caffrey*.

The opinion of the court was delivered by

SWAYZE, J. This is an action by a broker to recover commissions on a sale of real estate. On October 22d, 1913, John B. Van Wagenen, one of the defendants and tenants in common, signed a written agreement to pay the plaintiff a commission of two and one-half per cent. for the sale of the property. The defendants claim that this agreement was meant to apply only to a proposed sale to the Pennsylvania Railroad Company; that no such sale was made; that thereupon in December, 1913, the agreement for commissions was returned by Freeman to Van Wagenen and abandoned. In fact, the agreement was not produced at the trial; the plaintiff relied on what was said to be a copy which had been retained by his lawyer. The point in this respect was that the agreement had been abandoned by consent, although there are suggestions in the case and in the briefs that the defendant sought to vary the terms of the agreement by making it applicable only in case of a sale to the railroad. The learned trial judge rightly held that the evidence was not admissible for that purpose and put to the jury the real question whether the written authority was given up by the plaintiff, so as to render it of no effect.

Whether the authority was given up or not, the plaintiff continued his efforts to sell the property; he claims, of course, that he was acting under the written authority; the defendants claim that he was acting only under a verbal authority from John B. Van Wagenen, whose agency for all the tenants in common is not disputed. As a result of the plaintiff's efforts, a prospective purchaser was procured in the person of Cobb. Pending the actual execution of a contract for sale with Cobb, the plaintiff produced, in March, 1914, another purchaser—Scherer—who offered a higher price; with him the defendants made a formal written contract on March 14th, 1914, for the conveyance of the land, and received \$1,000 on

Freeman v. Van Wagenen.

90 N. J. L.

account of the purchase price. This contract did not, however, result in a conveyance. Scherer sought to rescind and recover his thousand dollars, but failed. Meantime, the defendants actually conveyed the property to Cobb for a lower price than that at which they had authorized the plaintiff to sell. The claim of the plaintiff for commissions on the sale and conveyance to Cobb is not important for the present purposes, since the jury found in favor of the defendants on that issue and the plaintiff does not appeal. The question for us is whether there was any error in submitting the case to the jury as to the claim for commissions on the sale to Scherer. Assuming, as we must, in view of the jury's finding in favor of the plaintiff on this issue, that the authority of October 22d had not been given up, we think it was right to hold, as the judge did, that the authority, and the subsequent agreement for a conveyance to Scherer by the defendants, satisfied the requirements of the tenth section of our statute of frauds. There was an agreement signed by one of the defendants which complied with the statute; from the fact that the other defendants joined him in the contract to convey to Scherer, it was a necessary inference either that he was in fact their agent in signing the authority to Freeman, or that they had adopted his act. Under either view—actual present agency or subsequent adoption—he was entitled to recover if he had performed on his part. As to this, the defendants claim that although the plaintiff had produced a ready and willing purchaser in the person of Scherer, he had not produced one able to perform the contract. The judge charged that all the plaintiff was bound to do was to bring the parties together and get them to make a binding agreement. This was a correct statement of the law. It is a mistake to think that we decided, in *Hinds v. Henry*, 36 N. J. L. 328, that the broker could never recover unless he procured an able and willing purchaser. We said that the general rule was that when he had done that, his right to commission was complete. We did not deny that other facts also might make his right complete. A clear distinction is made in our cases between a sale and a conveyance of land. We agree with what was said in *Lindley*

90 N. J. L. Newark Homebuilders Co. v. Bernards Twp.

et al. v. Keim et al., 54 N. J. Eq. 418 (at p. 423), quoting the opinion of Vice Chancellor Pitney, to be found in 30 Atl. Rep. 1073, that the words "sale" and "sell" in agreements between the owners of land and real estate brokers mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms. This the plaintiff did; the defendants actually accepted Scherer as satisfactory; and the only question, so far as the Scherer transaction is concerned, was that put by the judge to the jury, whether the written authority had been abandoned by the plaintiff as the defendants claimed.

We find no error; the judgment is affirmed, with costs.

NEWARK HOMEBUILDERS COMPANY, PROSECUTOR, v.
TOWNSHIP OF BERNARDS, RESPONDENT.

Submitted July 6, 1916—Decided May 21, 1917.

The interest, which a landowner must pay on the amount of his assessment for sidewalk improvements, does not begin to run until the amount of such assessment has been definitely ascertained.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Arthur A. Palmer*.

For the township, *Harrison P. Lindabury*.

The opinion of the court was delivered by

SWAYZE, J. An assessment for sidewalk improvements was set aside and a new assessment ordered. The amounts to be assessed have been agreed upon, and the only question now submitted to us is from what time interest should run on the assessment. We think it should not begin to run until the

N. Y. Telephone Co. v. Newark.

90 N. J. L.

amount is ascertained by the court. Until that time the landowner is in no default; he cannot pay until the amount is known. That this is the rule seems to have been taken for granted in *State, ex rel. Miller, v. Love*, 37 N. J. L. 261. The cases cited on behalf of the township only hold that interest paid by the municipality is a part of the cost of the improvement. No doubt this is true, and we must assume, that the total cost required to be assessed includes all interest paid by the township. We cannot go back to February 4th, 1915, and, by allowing interest on the assessment from that date, compel the property owner to pay interest on interest for a time antedating the day when the amount of his own liability becomes known, and on interest that may not have been paid by the township until long after that date and up to the present time. That would mean not only compound interest but compound interest in advance.

NEW YORK TELEPHONE COMPANY, PROSECUTOR, v.
MAYOR AND COMMON COUNCIL OF THE CITY OF
NEWARK, RESPONDENT.

Submitted March 22, 1917—Decided June 6 1917.

Where there is nothing that in a legal sense implies the permanent devotion of a telephone company's property to a public use, an assessment for improvements may be measured by the increase in the market value of the land, and it is not limited to the benefit conferred on the company for its use of the property. It is only where land is acquired under a legislative sanction that implies its permanent devotion to a public use that such land has, in legal contemplation, no market value for any other purpose, and hence no market value to be enhanced.

On *certiorari* of assessment for benefits.

Before Justices SWAYZE, MINTURN and KALISCH.

90 N. J. L.N. Y. Telephone Co. v. Newark.

For the prosecutor, *Edward A. & William T. Day* (*Charles T. Russell* on the brief).

For the city, *Harry Kalisch*.

The opinion of the court was delivered by

SWAYZE, J. This assessment is for the same improvement involved in *Jenkinson v. Parmly*, *Comptroller*, and *Fiedler v. Parmly*, *Comptroller*. All the points but one are disposed of by the opinions in those cases. The additional point made in this case is that the assessment must be limited to the benefit conferred on the telephone company for its use of the property, and cannot be measured by the increase in the market value of the land; and inasmuch as the property is said to be permanently devoted to a public use of such a character that the present owner is not benefited by improved means of access, it is argued that the assessment should be nominal, or should, at most, be less than it would be if the property were ordinary business property. To sustain this position the prosecutor relies on *State, Morris and Essex Railroad v. Jersey City*, 36 N. J. L. 56; *Cemetery Company v. Newark*, 50 *Id.* 66; *Erie Railroad Co. v. Paterson*, 72 *Id.* 83. The last two cases do not help the prosecutor. In the *Cemetery Company* case the portion of the land to which the cemetery company had title was held liable to assessment. In the *Erie Railroad Company* case it was held that there might be an assessment for benefits to the use of the property, although there might be no assessment under the circumstances of that case for enhancement of market value. In the *Morris and Essex Railroad* case it was, indeed, held that the enhancement of the present market value was not the proper basis of assessment, but that result was justified by the facts peculiar to the case. The subject has been recently reviewed by the Court of Errors and Appeals, and the rule and the reasons on which it rests have been admirably stated by Mr. Justice Garrison. *New York Bay Railroad Co. v. Newark*, 82 *Id.* 591. The reason of the rule in *Morris and Essex Railroad Co. v. Jersey City*, he says, is "that land acquired under a legislative sanc-

Old Dom. Cop. Min., &c., Co. v. S. Bd. Taxes, &c. 90 N. J. L.

tion that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose and hence, as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced." The distinction between such a case and the present is that here there is nothing that in a legal sense implies the permanent devotion of the telephone company's property to a public use. It may be that in fact it is always likely to remain the best site in Newark for a telephone exchange, and that the company is never likely to move; it may be that the investment is so large that the loss due to a removal would be prohibitive; it may be that it is fitted up for the special business of the company. All these considerations would probably be applicable to any large business, to a bank, an insurance company or office building, a hotel, a factory or a department store. But there is nothing to show that the title to the property is likely to be affected by an abandonment of the present use, nor is the property so changed in character that it cannot readily be adapted to other business purposes. Such a change is not unknown in the case of the telephone company in Newark. We see nothing to distinguish the case from that of land used for the other kinds of business buildings just mentioned.

The assessment is affirmed, with costs.

OLD DOMINION COPPER MINING AND SMELTING COMPANY, PROSECUTOR, v. STATE BOARD OF TAXES AND ASSESSMENTS ET AL., RESPONDENTS.

Argued June 7, 1917—Decided June 15, 1917.

The annual license fee or franchise tax, imposed upon corporations by *Pamph. L.* 1906, p. 31, amending the supplement of 1901 (*Pamph. L.*, p. 31) to the act of 1884 (*Pamph. L.*, p. 282), is payable each year in advance, the year beginning with the first Tuesday of May.

90 N. J. L. Old Dom. Cop. Min., &c., Co. v. S. Bd. Taxes, &c.

On *certiorari*.

Before Justice SWAYZE, by consent.

For the prosecutor, *Gilbert Collins*.

For the respondents, *Herbert Boggs*, assistant attorney-general.

The opinion of the court was delivered by

SWAYZE, J. This case presents the question that was expressly reserved by the Court of Errors and Appeals in *American Woolen Co. v. Edwards, Comptroller*. Further reflection has confirmed me in the opinion expressed in that case. *Ante p. 293*. The present prosecutor was dissolved in March, 1917, and is therefore not liable to the franchise tax if the year for which it is claimed begins with the first Tuesday of May.

We have held that the tax is in the nature of a license fee, payable in advance. *New York and New Jersey Water Co. v. Hendrickson*, 88 N. J. L. 595, 600. In that case we pointed out the difference between such a tax declared by the legislature to be annual, and the ordinary property tax imposed upon a fixed day. In the *American Woolen Company* case I said that calling the tax a license fee, as the statute does, suggested payment in advance, since the government would naturally make the payment of the fee a condition precedent. I might have gone further and said that the legislature has in fact made the tax payable in advance as near as possible. The original act of 1884 was approved April 18th. The year for which the annual tax was thereby for the first time imposed could not begin until the tax was imposed by the approval of the act in April, and the tax was made payable in June, *i. e.*, as soon as the necessary returns could be had and the calculations made. The Court of Errors and Appeals did not question this view in the case cited. It results that the year for which the tax is to be paid cannot be the calendar year beginning January 1st. The act imposing this tax on corporations

Old Dom. Cop. Min., &c., Co. v. S. Bd. Taxes, &c. 90 N. J. L.

like the prosecutor was passed February 19th, 1901. *Pamph. L., p. 31*. If the "annual license fee or franchise tax," as the act calls it, were imposed for a calendar year, that year could not have begun until January 1st, 1902, unless the tax were expressly made retroactive. Now, the act of 1901 was a supplement to the act of 1884. *Pamph. L., p. 282; Comp. Stat., p. 5286*. Taxes under that act are payable in June and subject to a penalty after July 1st. If we held that the license fee or franchise tax is for a calendar year we should either have the absurdity that the first annual tax under the act became payable six months before the year for which it was levied had begun or we should have the injustice of construing a tax to be retroactive when the legislature had not made it so. I do not question the power of the legislature to make a tax retroactive, but, on well-settled principles, we will not adopt such a construction unless the language plainly requires it. The language of the statute is so far from requiring such a construction that the result would be absurd. We should be forced to say that a corporation which ceased to exist on February 18th, 1901, would be liable to a tax which was not imposed by the legislature until February 19th, 1901.

It seems too obvious to require further illustration that the intent of the legislature was that the year should begin with or after the passage of the act and before the tax became payable thereunder. As to the class of corporations to which the prosecutor belongs the year must begin between February 19th and July 1st. In the absence of any further indication it would be natural to assume that the year began at the earliest possible date, which would be the date the act imposing the tax took effect. This was the underlying reason for our ruling in *Brewing Improvement Co. v. Board of Assessors*, 65 N. J. L. 466, with reference to the Franchise Tax act of 1884. There are, however, other considerations which make that ruling inapplicable now. We held, in *Hardin v. Morgan*, 70 *Id.* 484; *affirmed*, 71 *Id.* 342, that the legislature had substituted the first Tuesday of May for the 18th day of April, the date the act of 1884 took effect. Now, we said, in the

90 N. J. L. Old Dom. Cop. Min., &c., Co. v. S. Bd. Taxes, &c.

earlier case, that that date marked the "beginning of the yearly period for which the fee or tax is charged." The necessary implication from the change of date by the act of 1901, and what was said in *Hardin v. Morgan*, is that under that act the first Tuesday in May marks the beginning of the yearly period for which the fee or tax is charged; *Hardin v. Morgan* was affirmed on the opinion of this court.

Possibly, it was open to the court, prior to that decision, to hold that the yearly period began April 18th or February 19th, depending on the class of corporation. It is not open to us now. The decision has been acted on for years, and the stability of jurisprudence requires that it should be adhered to. Not only is this required for the stability of our jurisprudence, but, since the decision in *Hardin v. Morgan*, the statute of 1901 has been amended. *Pamph. L. 1906, p. 31*. If the legislature had meant something different, the statute would have contained language apt for the purpose. It does not contain such language. The necessary inference is that the legislature was satisfied with the law as construed by the courts. There is another consideration of the practical administration of the act which fortifies this view. The act of 1906 re-enacts the provisions of the act of 1901, exempting manufacturing and mining corporations fifty per centum of whose capital stock is invested in mining or manufacturing carried on within this state. The courts had just held in the case cited that this exemption could not be allowed unless the annual return was made on or before the first Tuesday of May. By the statute the exemption must be allowed if the other conditions exist and return is made on or before that date. The necessary result is that in the case of mining and manufacturing companies the amount of the license fee or franchise tax could not be ascertained until that time. It cannot be that the legislature meant that a fee declared by statute to be annual can cover a time antecedent to the date when it first becomes possible to ascertain the amount thereof. The same rule must be applicable to corporations other than mining and manufacturing taxed by the same language of the same act of which the prosecutor is one.

Old Dom. Cop. Min., &c., Co. v. S. Bd. Taxes, &c. 90 N. J. L.

To hold that the year begins with the first Tuesday of May ensures uniformity; any other date ensures diversity; for if the year is held to begin January 1st as to corporations whose tax is determined by the situation on January 1st, it must be held by parity of reasoning to begin February 1st with corporations whose tax is determined by the situation on February 1st. If we take the view that the year begins with the passage of the act imposing the tax, it begins on April 18th as to corporations taxed under the original act of 1884 and on February 19th as to corporations taxed under the supplement of 1901. This diversity would be due, not to any legislative declaration, but to judicial construction, or, perhaps, rather, judicial inference, an inference not permissible. We must remember that the supplement of 1901, as amended in 1906, is part of the act of 1884, and the act and its supplements must be treated as a consistent whole.

There is also an historical reason and a reason of convenience for holding that the tax year begins in May. For many years, and certainly since the constitution of 1844, our legislature has met in January. It was natural that taxes imposed by the legislature should become effective after there had been time for legislation. Ordinarily, May would come after adjournment and would prove the earliest convenient date. If, for example, the legislature should think it wise to increase the franchise taxes as it has increased some franchise taxes this winter, it would certainly seem unfair to make the increase retroactive, when the business of the corporation had been adjusted to the existing situation. No charge of unfairness for that reason, at least, could be brought against a tax to begin after the adoption of the legislation. No doubt the legislature might impose a franchise tax as they impose the general property tax, as an imposition taking effect on a particular day; no doubt they might also measure the amount of the tax by the situation as it existed on any day selected even though that day was before the act took effect. That is not the question here. The legislature has declared that this tax shall be annual. This can only mean that it shall be imposed once a year. In order that only one tax a year may be

90 N. J. L. Old Dom. Cop. Min., &c., Co. v. S. Bd. Taxes, &c.

imposed, it must be decided when the year begins and ends. To decide that question we must, of course, go back to the origin of the legislation, since each succeeding year must cover the same months as the first year. I need not repeat the arguments already stated against holding the tax year under this statute to be a calendar year nor the arguments stated in my opinion in the American Woolen Company case.

The United States Supreme Court, in construing the Bankruptcy act, held that the franchise tax was "legally due and owing" within the meaning of that act in the case of a corporation that was adjudicated a bankrupt on April 23d. *New Jersey v. Anderson*, 203 U. S. 483, 494. With the construction of the Bankruptcy act we have nothing to do. The court did not consider the history and language of our statute imposing the tax nor our decisions thereunder, although *Hardin v. Morgan* was cited by counsel. The case is not therefore a decision as to the meaning of our act. If it were, however, it would not control us. We recognize the eminence of that tribunal and entertain the most profound respect for its decisions, and even for its informal expressions of opinion, but it is vital to the very existence of the several states that their own tribunals control the construction of their own statutes, and this is pre-eminently true of tax acts which affect the state's revenue. The Supreme Court of the United States, in that very case, maintained its well-established right to construe federal statutes, notwithstanding a previous construction by a state tribunal. It is for us to maintain with equal vigor our right to construe our own state statutes. This right is so thoroughly settled by decisions of the United States Supreme Court that that tribunal will follow the decision of the state court on the construction of a state statute, notwithstanding its own prior decision to the contrary. *Fairfield v. County of Gallatin*, 100 Id. 47; recently cited as authority in *Northern Pacific Railway Co. v. Meese*, 239 Id. 614 (at p. 619).

The tax in this case must be set aside.

Schwarzrock v. Bd. Education of Bayonne. 90 N. J. L.

GUSTAV G. SCHWARZROCK, RELATOR, v. BOARD OF EDUCATION OF BAYONNE, RESPONDENT.

Argued May 7, 1917—Decided July 6, 1917.

1. Under section 10 of the School law (*Comp. Stat.*, p. 4727) the commissioner of education has jurisdiction in controversies involving the removal, by a local board, of a person from a position existing under the School law.
2. The hearing by the commissioner of education in any controversy or dispute of which he has jurisdiction by virtue of the provisions of section 10 of the School law, is a new hearing, and he is not limited to a mere review of evidence taken before the local board.
3. The action of the state board of education in setting aside the removal of a person from a position existing under the School law, has the effect of a judgment, and a *mandamus* will issue thereon in a proper case, commanding the payment of the salary due such person. Such a case is presented when it appears that he has always been ready and willing to perform his duties and that there are funds in hand applicable to the payment of the amount due him.

On *certiorari* of decision of state board of education, and on demurrer to alternative *mandamus*.

Before Justice SWAYZE, by consent.

For Schwarzrock, *Mark Townsend, Jr.*

For the board of education, *Daniel J. Murray.*

The opinion of the court was delivered by

SWAYZE, J. The *certiorari* at the suit of the board of education brings up the decision of the state board affirming the commissioner of education and reversing the action of the local board removing Schwarzrock from the position of supervisor of buildings and repairs.

1. I agree with the state board that the controversy was one of which the commissioner of education and the state board had jurisdiction under section 10 of the School law. That

90 N. J. L. Schwarzrock v. Bd. Education of Bayonne.

controversy was whether the local board had rightfully removed Schwarzrock from a position existing under the School law. The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempting bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the board, not for the purposes of the criminal law. Whether in such a case the board should act before action is taken by the criminal courts is a matter resting in the discretion of the board.

2. It necessarily results from the provision that the facts involved in any controversy or dispute shall be made known to the commissioner by written statements verified by oath and accompanied by certified copies of documents, that the hearing before him should be a new hearing, and that he is not limited to a mere review of evidence taken before the local board. An examination of the evidence in this case makes it clear that the commissioner and the state board reached a correct result. It would be intolerable to permit a public official of good repute to be dismissed from office on the testimony of one who had been convicted of perjury, in the face of the officer's denial.

3. The action of the state board setting aside the removal of Schwarzrock has the effect of a judgment and a *mandamus* will issue in a proper case. *Thompson v. Board of Education*, 57 N. J. L. 628. The alternative writ in the present case avers that Schwarzrock was appointed supervisor for three years at a salary of \$1,800; that after his wrongful dismissal he was always ready and willing to perform his duties until July 1st, 1916 (the expiration of his term), and that the local board refused to allow him to do so; that they refused to pay him the sum due as salary, \$3,000; that there are funds in the hands of the commissioner of finance and the custodian of the school funds applicable to the payment of said sum of \$3,000. These averments are admitted by the demurrer. Perhaps the defendant meant to challenge the averments by

State v. Lehigh Valley R. R. Co.90 N. J. L.

the reasons, but it is a mistake to say, as in reasons three and four, that the writ does not show that the amount claimed is in possession of respondents, and that it does not show that the respondents are in possession of moneys applicable to the payment required by the writ. The writ does show these facts. If the defendants meant to traverse the averments they should not have demurred. I cannot distinguish the present case from *Thompson v. Board of Education, supra*. The writ should go. While it prays relief in the alternative, that was proper in view of the relator's uncertainty whether there were funds in hand to meet his claim. In view of the admission of that fact, I see no reason why the peremptory *mandamus* should not command the drawing of a salary warrant upon the custodian and the payment by the custodian, or other proper officer. The relator is entitled to costs.

STATE, RESPONDENT, v. LEHIGH VALLEY RAILROAD COMPANY ET AL, PROSECUTORS.

Argued June 6, 1917—Decided August 14, 1917.

1. A corporation aggregate may be held criminally for manslaughter.
 2. An indictment in the statutory form charging a corporation aggregate with manslaughter will not be quashed for failure to specify whether voluntary or involuntary manslaughter is meant.
-

On motion to quash indictment.

Before Justices SWAYZE, BERGEN and BLACK.

For the motion, *Gilbert Collins* and *Lindley M. Garrison*.

For the state, *John F. Drewen, Jr.* (*Robert S. Hudspeth* on the brief).

90 N. J. L.

State v. Lehigh Valley R. R. Co.

The opinion of the court was delivered by

SWAYZE, J. [It has long been settled in this state that a corporation aggregate may in a proper case be held criminally for acts of malfeasance as well as for non-feasance.] *State v. Morris and Essex Railroad Co.*, 23 N. J. L. 360; *State v. Passaic County Agricultural Society*, 54 *Id.* 260. So well settled is the general rule that in the later cases it has not been even questioned. *State v. Erie Railroad Co.*, 83 *Id.* 231; 84 *Id.* 661; *State v. Lehigh Valley Railroad Co.*, 89 *Id.* 48; *ante p.* 340. Notwithstanding these decisions it is now argued that a corporation aggregate cannot be held criminally for manslaughter.

We need not consider whether the modification of the common law by our decisions is to be justified by logical argument; it is confessedly a departure at least from the broad language in which the earlier definitions were stated, and a departure made necessary by changed conditions if the criminal law was not to be set at naught in many cases by contriving that the criminal act should be in law the act of a corporation. The modern rule, as well as the reasons for it, were so well stated by Chief Justice Green, in the earliest case above cited, that his opinion may fairly be said to be the classical judicial deliverance on the subject. The Chief Justice recognized that there were certain crimes, for example, perjury, of which a corporation cannot in the nature of things be guilty; that there are other crimes, for example, treason and murder, for which the only punishment imposed by law cannot be inflicted upon a corporation; he added, however, without any specific illustration that a corporation could not be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient. We need not consider what crimes may be included under the last exception. [It is enough to say that the case is an authority which we are not at liberty to question, and would not question if we might, for the proposition that a corporation aggregate may be held criminally for criminal acts of misfeasance or non-feasance unless there is something in the nature of the crime, the character of the punishment prescribed therefor, or the essential ingredients of the crime.

State v. Lehigh Valley R. R. Co.90 N. J. L.

which makes it impossible for a corporation to be held. Involuntary manslaughter does not come within any of these exceptions. It may be the result of negligence merely and arise out of mere non-feasance. That a corporation may be guilty of negligence is now elementary; that it could be held criminally for non-feasance was settled by numerous precedents cited by the Chief Justice (at pp. 364, 365). We think of no reason why it should not be held for the criminal consequences of its negligence or its non-feasance. There is nothing in the punishment prescribed which makes it impossible to punish a corporation. Section 109 of the Crimes act prescribes in the alternative a fine of \$1,000 or imprisonment not exceeding ten years, or both. Clearly, a corporation may be punished by way of fine. The punishment is prescribed only for persons, but by section 9 of the act relative to statutes the word "person" is declared to include bodies corporate (artificial persons) as well as individuals (natural persons), and the same provision in a somewhat different form appears in section 220 of the Crimes act.

It is argued that the essential ingredients of manslaughter make it impossible to hold a corporation therefor. The crime was a felony at common law and some of the old authorities define homicide as the killing of one human being by another human being; that manslaughter was a felony at common law is not to the point, since "the distinction between felonies and misdemeanors is not observed in our criminal code." *Jackson v. State*, 49 N. J. L. 252; *Brown v. State*, 62 *Id.* 666 (at p. 695). Although it may be necessary in applying some of the old legal rules to our jurisprudence, to regard certain crimes called by our statute misdemeanors, as the equivalent of felonies for the application of common law rules, that necessity is one of terminology only; otherwise, there is now in this state no essential distinction between the two grades of offence known to the common law. We are unable to attribute to the ancient classification of manslaughter as a felony, the force in our modern jurisprudence which counsel claim for it.

As to the definition of homicide cited by counsel, it is enough to say that authorities of equal eminence define it differently. Blackstone, for example, in the passage cited in the brief (4 *Bl. Com.* 188), defines felonious homicide as "the killing of a human creature, of any age or sex, without justification or excuse." He then adds by way of illustration: "This may be done either by killing one's self, or another man." Blackstone does not say that these are the only cases of felonious homicide; as far as his text goes, the case of involuntary manslaughter by a corporation aggregate is not excluded, and is within the words of his definition. But if we assume, as is probably the fact, that Blackstone did not have in mind the case of involuntary manslaughter by a corporation aggregate as a possible case of felonious homicide, nevertheless, his illustration of suicide as a felonious homicide shows that the definition relied upon (killing of one human being by another human being) is inaccurate. We need not italicize the word "another" to show the conflict.

[We do not forget that voluntary manslaughter involves ingredients quite different from those involved in involuntary manslaughter. The indictment is in statutory form. Under the statute there is no difference between an indictment for voluntary, and an indictment for involuntary, manslaughter, and a defendant may be convicted of either. *State v. Thomas*, 65 N. J. L. 598. If his constitutional right to be informed of the nature and cause of the accusation were not sufficiently protected by the form of indictment prescribed by the statute, the obligation is not available to the present defendant, who has been furnished with a bill of particulars showing that the charge relied upon is that of involuntary manslaughter.]

We have examined the authorities in other jurisdictions to which we were referred. The decision of *People v. Rochester Railway and Light Co.*, 195 N. Y. 102; 88 N. E. Rep. 22; reported with note, 16 *Ann. Cas.* 837, was based entirely upon the construction of the exact language of the penal code, which defined homicide as "the killing of one human being by the act, procurement or omission of another," and the court necessarily, we think, held that "another" meant "another

human being." But Judge Hiscock, now the eminent Chief Judge, who spoke for the court, was at some pains to show that there was nothing essentially incongruous in holding a corporation aggregate criminally liable for manslaughter. The case is a good illustration of the way in which the proper growth and development of the law can be prevented by the hard and fast language of a statute, and of the advantage of our own system by which the way is open for a court to do justice by the proper application of legal principles.

The case of *Commonwealth v. Illinois Central Railroad Co.*, 152 Ky. 320; 153 S. W. Rep. 459, rests on the inaccurate definition of homicide to which we have already referred.

The case of *Regina v. Great Western Laundry Co.*, 13 Man. 66, rests chiefly on the absence of precedent. We cannot avoid the feeling that the learned judge attributed too much importance to this lack. We think the true question is whether the indictment is in harmony with established legal principles, as we think it is; we are not troubled by the fact that the case is one of first impression in New Jersey.

It is urged that the indictment should at least be quashed as to all the defendants except the Lehigh Valley Railroad Company, since the bill of particulars is directed at that defendant only. An indictment otherwise valid cannot be vitiated by the bill of particulars, although some motion depending on the latter may properly be raised at the trial. Moreover, a motion to quash is addressed to our discretion. *State v. Pisaniello*, 88 N. J. L. 262. That discretion ought not to be exercised in a case like this where injustice may be done thereby to the state and where the refusal to exercise it deprives the defendants of no substantial rights, since the question can be raised at the trial.

The motion to quash is denied. Let the record be remitted to the Hudson Quarter Sessions for trial.

90 N. J. L.State v. Pullis.

STATE, RESPONDENT, v. READ PULLIS, PROSECUTOR.

Argued February 20, 1917—Decided June 6, 1917.

It is no valid objection to an indictment that the foreman of the grand jury which found it was at the time a candidate for the office of freeholder, and, in his canvass, had suggested that the members of the existing board, of whom the defendant was one, were not to be trusted with the management of the county government, when neither malice nor ill-will is averred.

On motion to quash indictment.

Before Justices SWAYZE, MINTURN and KALISCH.

For the motion, *Egbert Rosecrans* and *Harlan Besson*.Opposed, *William A. Stryker*.

The opinion of the court was delivered by

SWAYZE, J. The most important objection to the indictment is that the foreman of the grand jury which found it was at the time a candidate for the office of freeholder, and in his canvass had suggested that the members of the existing board, of whom the defendant was one, were not to be trusted with the management of the county government. If we draw this inference from the fact that he stated that he stood for efficiency and economy in county government, and that the remedy was in the hands of the voters, we think it fails to justify us in quashing the indictment. The case differs from *State v. McCarthy*, 76 N. J. L. 295, where the proof showed partiality on the part of the sheriff in selecting the grand jury, as was possible under the law as it then stood. The present charge is in the nature of a challenge to the favor of a single grand juror, and goes no further. No malice or ill-will is averred, and the present defendant was not even the rival of the foreman of the grand jury for the office he sought.

Trenton & Mercer County Trac. Corp. v. Trenton, 90 N. J. L.

The case is within the rule of *State v. Turner*, 72 Id. 404; *State v. Rickey*, 10 Id. 83.

The objection to the form of the indictment is unsubstantial. It follows that approved by this court in *State v. Codrington*, 80 N. J. L. 496; *affirmed*, 82 Id. 728. We do not understand the suggestion of the brief that the question was not squarely discussed in the opinion in that case. We think it enough to aver that the defendant was an officer of the county, having been duly elected chosen freeholder by the qualified electors of the township of Blairstown, and having taken upon himself the said office without specifically averring that he took the oath of office.

The motion is denied. Let the record be remitted for trial to the Quarter Sessions.

TRENTON AND MERCER COUNTY TRACTION CORPORATION,
PROSECUTOR, v. INHABITANTS OF THE CITY OF
TRENTON AND BOARD OF PUBLIC UTILITY COMMISSIONERS,
RESPONDENTS.

Argued November 9, 1916—Decided August 1, 1917.

1. Where a traction company seeks to withdraw the sale of six tickets for a quarter and charge a straight five-cent fare, such withdrawal is an increase in rate sufficient to give the public utility commission jurisdiction to pass upon the same under section 17, paragraph "h" of the Public Utility act. *Pamph. L.* 1911, p. 380.
2. A resolution, adopted by the board of directors of a traction company, directing its officers to execute, with a municipality, immediately after the passage, by the municipality, of a new ordinance which would be less harmful to the company's interest, an agreement, already prepared (a copy of which was set forth in the resolution), providing for a fixed rate of fare to be charged on its lines, and in consequence of which resolution the ordinance in question was passed, constitutes a binding and valid agreement, notwithstanding that the agreement in question was not signed by the officers of the traction company as directed by the resolution.

90 N. J. L. Trenton & Mercer County Trac. Corp. v. Trenton.

3. The benefit to the traction company of what was omitted from the ordinance, in the way of drastic provisions inimical to its interests, was a sufficient consideration for the agreement.
4. Whether the mere act of passing the ordinance in pursuance of the agreement would be a sufficient consideration, in a legal sense, *quære*.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Frank S. Katzenbach, Jr.* (*Edward M. Hunt* on the brief).

For the city of Trenton, *George L. Record* (*Charles E. Bird* on the brief).

For the board of public utility commissioners, *Frank H. Sommer*.

The opinion of the court was delivered by

SWAYZE, J. Although the voluminous record in this case has necessarily required a long time to examine, the decision may well be rested on a single point and that within narrow compass. The prosecutor seeks to set aside an order forbidding it to put into effect a proposed withdrawal of the sale of six tickets for twenty-five cents on street railways operated by it. These railways are three in number—the Trenton Street Railway Company, the Mercer County Traction Company and the Trenton, Hamilton and Ewing Traction Company. They are operated under leases and agreements of October 15th, 1910. The two latter had been leased prior to 1909 to the first named for nine hundred and ninety-nine years.

We think it clear that the public utility commission had jurisdiction under section 17, paragraph “h” of the act. *Pamph. L. 1911, p. 380*. The withdrawal of the sale of six tickets for a quarter was an increase of an existing rate under which eighty-two per cent. of the passengers carried paid a

Trenton & Mercer County Trac. Corp. v. Trenton, 90 N. J. L.

fare of only four and one-sixth cents; by the proposed withdrawal they would be forced to pay a fare of five cents.

We find it unnecessary to pass upon the question whether the original ordinances and their acceptance amounted to a contract by which the companies were authorized to charge as much as five cents, or whether they amounted only to a limitation by which the companies were forbidden to charge more than five cents. It is likewise unnecessary, in our view, to consider whether a fare of four and one-sixth cents is reasonable, in view of present conditions and the situation of the company. We find that in 1909 a new contract was made between the city and the company which requires the company to sell six tickets for twenty-five cents upon all cars operated in the city of Trenton. The facts are as follows: For many years tickets had been sold at that rate. In 1909, the street railway company proposed to stop the sale. Naturally, great public interest was aroused, threats were made of attacks upon the franchisees of the company and the city authorities were preparing for such an attack and for amendments of the ordinances. An agreement was reached by negotiation, and on October 4th, 1909, the Trenton Street Railway Company adopted a resolution waiving its right to notice of alterations in the ordinances, and directing its officers to execute an agreement already prepared (a copy of which was set forth), immediately after the passage of a new ordinance, a draft of which had been submitted by the city counsel to the railway company. This ordinance provided for the sale of tickets at the old rate by the company upon all cars operated in the city of Trenton. The ordinance was passed by the common council on October 19th and approved by the mayor on October 22d, eighteen days after the resolution of the railway company. Had the agreement been signed by the officers of the company, as directed by the resolution of October 4th, on the faith of which the city passed the ordinance, no question could have arisen. Instead of that, the company, after the passage of the ordinance, rescinded the resolution because, as the rescinding resolution states, it was falsely recited therein that the city had reserved the right to

90 N. J. L. Trenton & Mercer County Trac. Corp. v. Trenton.

alter the ordinances whenever in the judgment of the common council it became necessary for the public good. It is a little difficult to understand upon what theory it is supposed the false recital vitiates the action of the company. It is not charged that the city did anything to mislead the company in this respect; it could not have done so since the ordinances were necessarily as well known to the company as to the city; and the proposed written form of contract, submitted by the city counsel, recited what was the exact truth that the right of alteration or amendment was reserved "by the several ordinances aforesaid, or some of them." The addition of the qualifying words was enough to call the attention of the company to the existence of a question as to the extent of the city's right. With this draft before them, the directors chose to put a broader statement in the recitals of their own resolution. Manifestly, they ought not to be permitted for their own mistake to withdraw from the agreement after the city had acted thereon.

It is argued that the parties did not intend that there should be a complete contract until the written agreement was executed. The case, it is said, is within the rule of *Water Commissioners of Jersey City v. Brown*, 32 N. J. L. 504, decided by the Court of Errors and Appeals in 1866, and applied by the Supreme Court in *Donnelly v. Currie Hardware Co.*, 66 Id. 388. These cases are not applicable. In the first the water commissioners directed that their engineer and attorney should prepare a contract and submit the same for approval by the board before being executed. The court said that several particulars, as to the time of finishing the work, as to the manner of doing it, and as to the guarantee of its permanence, remained to be settled. The second case was decided upon the ground that there had been no agreement as to the time allowed for beginning and completing the work and the mode of payment, matters which are generally provided for in such arrangements. As Lord Cranworth said, in *Ridgeway v. Wharton*, 6 H. L. Cas. 238 (at p. 268), the fact "that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the pre-

Trenton & Mercer County Trac. Corp. v. Trenton, 90 N. J. L.

vious negotiations to amount to an agreement;" but at the same time he protested against its being supposed because persons wish to have a formal agreement drawn up that therefore they cannot be bound by a previous agreement if it is clear that such an agreement had been made; and he expressed his approval of Sir William Grant's decision in the leading case of *Fowle v. Freeman*, 9 Ves. 351. In *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266, it was held that a final agreement had been reached, although the parties intended that a lease embodying the agreement should be executed. The applicability of that case to the present is not weakened by the fact that a written memorandum would have been there necessary to satisfy the statute of frauds, if the vendee had not taken possession. The taking possession did not supply the terms of the lease, and before decreeing that the lease should be executed, it was necessary for the court to find that a final agreement had been previously reached, and that the execution of the lease was necessary only by way of part performance of the agreement, and not as a condition precedent to the existence of a final agreement. The facts of the present case bring it within the rule of *Wharton v. Stoutenburgh*. The draft agreement had been submitted by the city to the company; the company had assented to its terms; all that remained was for the executive officers to execute the written instrument in which the terms of the agreement were set forth; but the officers had no power to vary the terms, and it was not contemplated that the directors should again pass on the matter. The case is, as if, in *Water Commissioners of Jersey City v. Brown*, the agreement had been already prepared and adopted by the water commissioners.

There was sufficient legal consideration for the agreement by the company. It is true the ordinance did not affirmatively concede any benefit to the company; on its face it was rather a detriment; but that is too narrow a view to take. The situation was that the company was liable to attack and the ordinances might be altered or amended in such a way as to be very harmful or at least productive of long and expensive litigation. What the company secured was the adoption

90 N. J. L.Whitaker v. Dumont.

of an ordinance which contained no such drastic changes; the benefit to the company was in what the ordinance omitted, not in what it contained. In saying this, we are not to be understood as suggesting that the mere act of passing the ordinance in pursuance of the agreement would not be a sufficient consideration in a legal sense.

We think there was a valid contract requiring the company to sell six tickets for a quarter, and hence the public utility commissioners might well conclude that such a rate was just and reasonable under the circumstances of the case.

It is said, however, that the Mercer County Traction Company and the Trenton and Hamilton and Ewing Traction Company could not be affected by the ordinance because no official action was taken by either with reference to its terms. This argument overlooks the fact that both those companies were at the time under lease to the Trenton Street Railway Company for a term of which more than nine hundred and ninety years were still to come. The probability of the two lessor companies being affected prejudicially by the ordinance is negligible.

The order is affirmed, with costs.

BENJAMIN J. WHITAKER ET AL., PROSECUTORS, v. MAYOR
AND COUNCIL OF THE BOROUGH OF DUMONT,
RESPONDENT.

Argued February 20, 1917—Decided August 11, 1917.

An assessment by commissioners of a borough, which included assessments for laying out and opening a new street and the improving of such street, as well as the cost of sidewalk construction, will be set aside, since separate assessments of damages or benefits for each improvement should have been made under section 33 of the Borough act. *Comp. Stat.*, p. 244.

On *certiorari* to set aside assessments for special benefits.

Whitaker v. Dumont.90 N. J. L.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutors, *William M. Seufert*.

For the respondent, *Frank G. Turner*.

The opinion of the court was delivered by

SWAYZE, J. Although the writ removes only the assessment, the prosecutor improperly assigns reasons for setting aside the ordinances under which the improvements were made. The justice who allowed the writ acted advisedly in limiting its scope. The prosecutor had allowed the time for questioning the ordinances to pass by and he could only question the assessment. This consideration disposes of most of the reasons assigned.

In order to determine the question of the validity of the assessment, we have had to pick out from the voluminous, and somewhat confused, record the essential facts. Three ordinances were approved April 11th, 1911. One established the grade of part of Madison avenue. One provided that the avenue be widened to fifty feet where it was then less; that it be graded and improved according to the grade to be established therefor; that the improvements be done according to such plans and specifications as the mayor and council might adopt therefor, and that the cost be assessed upon the property benefited thereby. The third provided for the construction of cement sidewalks. Subsequently, the borough authorities called for bids "covering the grading work and construction of cement sidewalks." Separate bids were received and separate contracts were awarded (1) for the sidewalks; (2) for the grading and macadamizing. Subsequently, some additional grading, macadamizing and improving was done. On March 15th, 1915, the cost and expenses were ascertained to be \$11,368.49, of which \$7,869.75 was for roadway construction, and \$3,327.84 was for "sidewalk grading." Of the total, all but \$670.24 was assessed on property owners as special benefits. The return of the commissioners shows that their assessment was for laying out, opening and improve-

ment of Madison avenue. Obviously, this is not an assessment of the cost of grading and paving and laying sidewalks. Section 33 of the Borough act discriminates between laying out and opening, which are provided for in paragraph 1, and grading and paving, which are provided for in paragraph 2. Paragraph 2 authorizes a single ordinance for the making of more than one of the improvements therein specified, all of which are cognate in character and relate to the improvement of existing streets, but does not authorize the inclusion in the same ordinance of provisions as to laying out and opening, which have to do with new streets. Moreover, paragraph 2 requires a separate assessment of damages and benefits for each improvement, and whatever doubt there may be as to the extent to which this goes (*Cook v. Manasquan*, 80 N. J. L. 206), there can be no doubt that a distinction must be made between benefits due to laying out and opening under paragraph 1 and improvements under paragraph 2. The observance of the rule is especially important in a case like the present, where there was no ordinance to lay out and open a street, and apparently no laying out and opening in point of fact. We cannot tell how much of the assessments the commissioners attributed to laying out and opening and how much to the improvement of the street. All we can tell from the return is that some of the assessment was for laying out and opening for which there was no authority. There is a further difficulty. The amount of the assessment is much in excess of the cost of the street improvement and obviously includes some of the cost of the sidewalks. The return of the commissioners says nothing about an assessment for the sidewalks. Under the statute, the cost of sidewalks is to be paid by the owners of the lands in front of which the same is constructed, a very different method from that of an assessment for benefits. The commissioners could not legally have combined the two in a single assessment, and it is probably for that reason that they returned no assessment for sidewalks; but they could not by thus omitting to assess for sidewalks according to the statute clothe themselves with authority to assess for the street improvements more than they cost. The

Hoff v. Public Service Railway Co.

90 N. J. L.

suggestion that the expense of the sidewalks was not included in the \$11,368.49, for which the assessment was made, is futile. The determination of cost, on page 58, shows that there was included for "sidewalk grading" \$3,327.84. This determination we must assume to be correct, although the amount seems large for grading alone. The resolution printed on page 142, on which counsel relies, must be incorrect. The item "side grading" has no meaning that we can ascertain unless it refers to the sidewalks. Moreover, there was a contract for the construction of sidewalks, and as near as we can tell the road construction alone would not, under the contract therefor, amount to the total cost as ascertained.

The assessment must be set aside, with costs. As to the sidewalks there should be a new assessment. Whether a new assessment of the cost of the street improvement is permissible is not clear. The answer to the question seems to depend chiefly on whether the ordinances authorized the macadamizing of the street. We will hear counsel as to the form of the judgment to be entered.

HELEN HOFF, RESPONDENT, v. PUBLIC SERVICE RAILWAY COMPANY, APPELLANT.

Submitted March 22, 1917—Decided June 22, 1917.

1. A carrier owes to its passenger the duty of protecting him from the violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care, and it will be held responsible for its servant's negligence in this particular when, by the exercise of proper care, the act of violence might have been foreseen and prevented.
2. The failure of the servant of a carrier to prevent the commission of an assault upon a passenger by another passenger, to be a negligent failure or omission must be a failure or omission to do something which could have been done by the servant; and, therefore, there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the

90 N. J. L.

Hoff v. Public Service Railway Co.

- tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command.
3. In passing upon a motion for the direction of a verdict, the court cannot weigh the evidence, but is bound to concede to be true all evidence which supports the view of the party against whom the motion is made, and to give to him the benefit of all legitimate inferences which are to be drawn in his favor.
 4. The fact that a passenger was intoxicated to the knowledge of the carrier's conductor, the fact that he had repeatedly insulted a woman passenger in the presence and hearing of the conductor, and immediately after the last insulting remark arose from his seat and struck her twice, all without any word of admonition or protest by the conductor or attempt upon his part to prevent the assault, although he was throughout within arms' reach of the drunken man, are circumstances from which the jury could properly infer that with proper care upon the part of the conductor the act of violence might have been foreseen and prevented.

On appeal from the Hudson County Circuit Court.

Before Justices TRENCHARD and BLACK.

For the appellant, *Lefferts S. Hoffman, Leonard J. Tynan* and *George H. Blake*.

For the respondent, *Alexander Simpson*.

The opinion of the court was delivered by

TRENCHARD, J. This suit was brought by the plaintiff, a passenger on a trolley car of the defendant company, to recover for injuries sustained by her by reason of the failure to protect her as a passenger.

The plaintiff had a verdict of the jury and the defendant appeals.

The defendant complains of the refusal of the trial judge to direct a verdict in its favor, and the determination of the propriety of that action will dispose of every question raised and argued.

We are of the opinion that the refusal to direct a verdict was right.

Hoff v. Public Service Railway Co.90 N. J. L.

At the time when the motion was made it was open to the jury to infer from the evidence, if they saw fit, the following matters of fact:

The plaintiff, a young woman, boarded a closed "pay-as-you-enter" car of the defendant company on March 20th, 1915, at First street, in Bayonne. It was late at night and there were some men on the car who had been to a prize fight and who had been drinking. As she walked into the car, one of the men said, "Look who is here!" or "Look who is coming!" The plaintiff was agitated and walked into the car without paying her fare and afterwards got up and paid her fare. As she passed the man the second time he again spoke to her, saying, "Hello chicken!" and addressed other insulting remarks to her as she was paying her fare. When the car reached Sixteenth street (where she wished to alight), as she passed the drunken man, he said, "Hey, chicken, take us along." The plaintiff resented this remark and turned and said to him: "You insulted me since I got on this car, if you insult me again I will smack your face." The man then arose from his seat and struck her twice; once in the breast and once in the face, severely injuring her. These insulting remarks made by the drunken man to and concerning the plaintiff were all in the presence of the conductor of the car (who stood within two feet of the man) and were heard by him, but he uttered not a word of admonition or protest, and made no effort to protect the plaintiff from such insults, nor from the assault, although he knew that the man was intoxicated.

Now, the rule is that a carrier owes to its passenger the duty of protecting him or her from the violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care, and it will be held responsible for its servant's negligence in this particular, when, by the exercise of proper care, the act of violence might have been foreseen and prevented. *Exton v. Central Railroad Co.*, 62 N. J. L. 7; 63 *Id.* 356.

It is, unquestionably, the right of a carrier to control a person who is behaving in an improper manner on its con-

veyance, or to eject a person who refuses to desist from objectionable and indecent conduct, or whose condition is such as to render his presence on the conveyance offensive or dangerous to the reasonable comfort or safety of other passengers. And having this power of control or ejection it is only reasonable to hold the carrier liable in case its negligent failure to exercise it results in injury to a passenger. The gist of the action for such injuries is the negligence of the carrier or its officers in charge of the conveyance.

The negligent omission of the servant of a carrier to prevent the commission of a tort upon a passenger by fellow-passengers being, as we have stated, the basis of the carrier's liability to a passenger injured by such tort, it follows, of course, that the failure to prevent the commission of the tort, to be a negligent failure or omission, must be a failure or omission to do something which could have been done by the servant; and, therefore, there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command.

The defendant argues that the evidence conclusively shows (1) that the man who committed the assault upon the plaintiff was not drunk, and (2) that its conductor had no reason to anticipate the assault, and hence that a verdict should have been directed in its favor.

But this contention is not well founded in fact.

In passing upon the motion for a direction of a verdict for the defendant, the court cannot weigh the evidence, but is bound to concede to be true all evidence which supports the view of the plaintiff, and to give her the benefit of all legitimate inferences which are to be drawn in her favor. So considered, it was open to the jury to find both that the passenger who assaulted the plaintiff was drunk, and that the conductor had reason to anticipate the assault sufficiently long in advance to have prevented it. Of course, the mere fact that a passenger may have drunk to excess will not, in every case,

State v. Hop.

90 N. J. L.

justify his expulsion from the car. It is rather the degree of intoxication, and its effect upon the man, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right or imposes the duty of expulsion. In the present case, the mere fact that the drunken man was not ejected is not a controlling circumstance. But the fact that the man was intoxicated to the knowledge of the conductor, the fact that he had repeatedly grossly insulted the plaintiff in the presence and hearing of the conductor, and immediately after the last insulting remark arose from his seat and struck the plaintiff twice, all without any word of admonition or protest by the conductor, or attempt upon his part to prevent the assault, although he was throughout within arms' reach of the drunken man, are circumstances from which the jury could properly infer that with proper care upon the part of the conductor the act of violence might have been foreseen and prevented.

The judgment below will be affirmed, with costs.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. SAM
HOP, PLAINTIFF IN ERROR.

Submitted March 20, 1917—Decided June 22, 1917.

1. In order that a defendant may have the benefit of section 136 of the Criminal Procedure act (*Comp. Stat.*, p. 1863), the trial judge must, in addition to the formal and ordinary return to a writ of error, certify that the proceedings transmitted by him to the court of review comprise the entire record of the proceedings had upon trial. And where the defendant neglects to obtain such a certificate, the review is limited to alleged errors arising on the face of the record itself or upon bills of exceptions duly taken.
2. A lack of sufficient evidence to make out the case charged in the indictment is not a ground for arresting judgment. In order to raise such a question there should have been a request to direct an acquittal or to charge in conformity with the contention.

On writ of error.

90 N. J. L.State v. Hop.

Before Justices TRENCHARD and BLACK.

For the plaintiff in error, *Charles E. S. Simpson*.

For the defendant in error, *Robert S. Hudspeth*, prosecutor of the pleas.

The opinion of the court was delivered by

TRENCHARD, J. The defendant below was convicted in the Hudson Quarter Sessions Court on an indictment for sodomy.

The return to the writ of error is only the formal and ordinary return. There is no certificate by the trial judge that the proceedings transmitted by him to this court comprise the entire record of the proceedings had upon the trial, such as is required to obtain a review under section 136 of the Criminal Procedure act. *Comp. Stat.*, p. 1863. Our review is therefore limited to alleged errors arising on the face of the record itself or upon bills of exceptions duly taken. *State v. Webber*, 77 N. J. L. 580.

There is no bill of exceptions, and the only assignment of error is "because the court denied the motion made on behalf of the defendant before judgment was announced for an arrest of judgment."

We are of the opinion that such motion was properly denied. The sole contention made in support of the motion is that there was not sufficient evidence to support the conviction. But a lack of sufficient evidence is not a ground for arresting judgment. In order to properly raise such a question there should have been a request to direct an acquittal or to charge in conformity with the contention. *Powe v. State*, 48 N. J. L. 34; *State v. Kelly*, 84 Id. 1. No such request was made. However, in order to see that no injustice has been done, we have looked into the question argued and find no merit in it.

The judgment of the court below will be affirmed.

Gordon v. Pannaci.90 N. J. L.

SAMUEL GORDON, APPELLANT, v. VERONICA PANNACI,
RESPONDENT.

Submitted March 22, 1917—Decided June 6, 1917.

Proceedings taken in District Courts under the supplement of 1915, page 182, to the Executions act, by way of garnishing a debt due the defendant in execution, are reviewable properly by *certiorari* and not by appeal.

On appeal of the First National Bank of Sea Bright from a rule of the District Court, first judicial district of Monmouth county, making absolute a rule to show cause why said bank should not be required to pay to the sergeant-at-arms of said court the amount of a money balance to the credit of the defendant, in part satisfaction of an execution issued under plaintiff's judgment in this cause.

Before Justices GARRISON, PARKER and BERGEN.

For the appellant, *William L. Edwards*.

For the respondent, *James J. Gibb*.

The opinion of the court was delivered by

PARKER, J. This is not a case for an appeal. As appears above, the judicial action attempted to be brought under review is an order of the court, or the judge, in what may be described as a statutory garnishee proceeding, evidently under the supplement of 1915, page 182, to the Executions act, which makes rights and credits of a defendant in execution subject to levy thereunder, and by section 9 authorizes the court by procedure of the character of that apparently pursued in this case, to order the debtor of the defendant to pay the debt to the officer holding the execution.

Various questions are attempted to be raised: the sufficiency of the execution; of the levy by the officer; the ex-

clusion of evidence on the hearing of the rule, and so on. We think they ought not to be passed upon in the present case. Apart from the fact that neither the rule to show cause nor the rule making the same absolute is put before us in the printed case, it is obvious, from what has been said, that the proceeding itself is not according to the course of the common law. It partakes of the nature both of attachment, as the term is understood in modern practice, and of proceedings supplementary to execution. Both these, like a claim of property levied on or attached, are of purely statutory origin, and of a class of cases reviewable only by *certiorari*. Supplementary proceedings are of a summary character. *Westfall v. Dunning*, 50 N. J. L. 459 (at p. 461). Refusals to obey an order to pay out of income, in satisfaction of a judgment, have been held contemptuous, and such adjudications have been reviewed under the Contempt act. *Adler v. Turnbull & Co.*, 57 Id. 62; *Eggert v. McHose*, 80 Id. 101. In one case this court considered without comment an appeal from an order for payment of income. *White v. Koehler*, 70 Id. 526. But the correct and substantially uniform practice has been by *certiorari*, as in *Spencer v. Morris*, 67 Id. 500; *Hershenstein v. Hahn*, 77 Id. 39, and *Russell v. Mechanics Realty Co.*, 88 Id. 532. This brings this class of cases in line with claims of property where the rule is the same. *Berry v. Chamberlain*, 53 Id. 463; *Reiman v. Wilkinson, Gaddis & Co.*, 88 Id. 383, 386; *City Bank of Bayonne v. O'Mara*, Id. 499. As was said in the last case (at p. 500): "The point is material, for if *certiorari* be the only proper method of review, it follows that frivolous and non-meritorious attempts to remove the record, which appeal, as a matter of right, would facilitate, will be cut off by the timely refusal of an *allocatur* in *certiorari*." And, in the same opinion, the bar was apprised that the court would deal with appeals improperly brought, of its own motion.

The appeal is dismissed, but without prejudice to an application for a *certiorari* which would properly bring up the proceedings for review, including the two orders not printed in the present case.

Belmont Land Association v. Garfield.90 N. J. L.

BELMONT LAND ASSOCIATION OF THE BOROUGH OF GARFIELD, PROSECUTOR, v. THE MAYOR AND COUNCIL OF THE BOROUGH OF GARFIELD, RESPONDENT.

Submitted July 5, 1917—Decided September 17, 1917.

1. Under the General Borough act an assessment for the cost of sidewalks is to be made by resolution of the common council, on the lands fronting on the street along which the sidewalks are laid, and not by commissioners of assessment appointed to determine the damages and benefits arising from the improvement of public streets.
2. Commissioners of assessment in considering the benefits to be assessed against the landowner, for the grading and improvement of a public street in a borough, are required to consider and report the damages which a landowner may suffer because of the improvement as well as benefits which may accrue therefrom.
3. Every ordinance for making street improvements must be preceded by the petition required under section 53 of the Borough act. *Comp. Stat.*, p. 260.

On rule to show cause why a writ of *certiorari* should not be allowed.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Addison Ely*.

For the respondent, *Joseph Lefferts*.

The opinion of the court was delivered by

BERGEN, J. The prosecutor holds a rule to show cause why a writ of *certiorari* should not be allowed to review two ordinances adopted by the respondent and all proceedings thereunder, including the report of the assessment against the prosecutor for benefits, and the order of the respondent confirming the same, relating to the improvement of Dewey street, in the borough of Garfield, between Palisade avenue and Chestnut street. The improvements were made under separate ordinances, one providing for the grading of the

street and the construction of a cement gutter and curb on each side of the street, and the other for the construction of a cement sidewalk on both sides of Dewey street between the same points. The entire work was let under one contract, and benefits assessed in a single report. The proceedings are so replete with errors from start to finish that the respondent does not undertake to justify them prior to the assessment report, but relies upon section 92 of the Borough act (*Comp. Stat.*, p. 275), which provides that no *certiorari* shall be allowed to set aside an ordinance for any improvement after a contract therefore shall have been awarded, nor to review any assessment after thirty days shall have elapsed from its confirmation.

This testimony shows that the requisite number of resident freeholders did not sign the petition for the improvement, the statute providing that such an ordinance shall be preceded by an application in writing for the improvement, signed by at least ten freeholders of the borough residing therein; that no such notice as the law requires relating to the sidewalk ordinance was given the landowner, nor was he afforded an opportunity to do the work if he desired; that the advertisement for bidders for the contract was not published in Bergen county, where the improvement was to be made, but in newspapers in Passaic county; that the minutes of the council do not show that the ordinances were adopted by a majority vote, and that the defendant had no actual notice of the proceedings until after the work was finished. Whether under these circumstances the statutory limitations upon the power of this court to exercise the right to issue its prerogative writ is reasonable, it is not necessary to determine, for this matter can be disposed of on other grounds, in the consideration of which we assume that the ordinances are non-assailable, leaving that question open to the prosecutor on final hearing.

As to the sidewalk assessment we think the writ should go because for want of proper notice to the prosecutor, no assessment can lawfully be laid against it in the present proceedings. Section 50 of the Borough act (*Comp. Stat.*, p. 258) provides that any ordinance providing for the construc-

tion of sidewalks "shall provide for allowing the owner or owners of the land in front of which said sidewalks may be so constructed * * * at least thirty days' time in which to do the work required thereby, and that written notice of the required work be sent to such owner by mail, if their post-office address be known; if not known, then by posting such notice on the premises affected thereby," or by personal service if the owner be a resident. No such notice was given in either of the methods prescribed by the statute, and the ordinance does not make the provision the statute requires. The next section of the act—section 51—provides that if the owner shall fail to do the work within the thirty days, the municipality may do it and assess the cost, by resolution, upon the property and certify the same to the borough clerk who shall deliver it to the borough collector, and he shall enter it in a book to be called "Sidewalk Assessments," from which time it shall become a lien upon the premises. It thus appears that the commissioners of assessment have no authority to assess for the cost of sidewalks, the entire cost of which is to be assessed by the common council on the property along which it is laid, and it is distinct from the grading of the street for the reception of the sidewalk, the question of damages and benefits from change of grade being adjusted in proceedings relating to the establishment and resultant improvement of the grade of the street. Under the statute the borough has no power to deprive the landowner of his right to make the required improvement, nor had the commissioners of assessment any authority to make the assessment for the cost of the sidewalk, for the legislature has provided another method.

We are also of opinion that prosecutor is entitled to a writ to review the assessment for grading. The grading required a cut in front of prosecutor's property which placed the level of its property at one point seven feet above the street, and the testimony tends to show that this was a damage, yet the commissioners, apparently, did not take into account the question of damages. In addition to this, the testimony shows that there is some ground for prosecutor's complaint that it

was improperly assessed because of the elevation of its land, and that it was unfair to put the greater part of the cost of the grading on the lands along Dewey street immediately in front of the improvement, while the entire street was benefited by the change of the grade. It also appears that the assessment includes the cost of the sidewalk, and that in ascertaining the cost of the improvement upon which the assessment was based, no distinction was made between the different items of cost.

We think the applicant for this writ has presented a sufficiently debatable question to justify the allowance of the writ, and in view of the want of a required petition before the ordinance was adopted, which seems to be necessary to give the common council jurisdiction to pass the ordinances, we think the writs should extend to a review of the legality of the ordinances.

This is a proceeding to take prosecutor's property, for money is property, against its consent, by means of a void ordinance adopted without observing one of the conditions of the delegated power, and the legislature never intended to put such *ultra vires* action beyond the power of this court to review, simply because a contract has been awarded based upon it, and if it did, then a constitutional question is presented of sufficient importance to warrant solemn argument.

The ordinance must be one which the council had the power to adopt if the bar of the statute is to operate, and where the council fails to pursue the provisions of the legislative delegation of power and acts without jurisdiction, it is beyond the power of the lawmaker to arrest the power of review by *certiorari*. *Traphagen v. West Hoboken*, 39 N. J. L. 232.

The only other point raised by the defendant is, that under the statute no *certiorari* shall be allowed to review an assessment for a street improvement after thirty days shall have elapsed from the date of the confirmation. The prosecutor had no notice of the improvement until after it was completed, and its first notice was information of a meeting of the commissioners of assessment whose report was confirmed November 14th, 1916, and on December 12th, 1916, within

Cahill v. West Hoboken.

90 N. J. L.

thirty days after the confirmation, it applied for a writ of *certiorari* and was allowed this rule to show cause. This we deem sufficient.

The prosecutor will be allowed writs of *certiorari* to review both ordinances, and all proceedings thereunder, including the assessments, based thereon.

THOMAS A. CAHILL, PROSECUTOR, v. TOWN OF WEST
HOBOKEN, RESPONDENT.

PATRICK MCCARTHY, PROSECUTOR, v. TOWN OF WEST
HOBOKEN, RESPONDENT.

Argued March 21, 1917—Decided July 9, 1917.

While a municipal office may be abolished by the municipality for economical or beneficial reasons, and the incumbent deprived of his office, although protected by a tenure of office statute, that end cannot be accomplished by a removal from office contrary to the terms of such a statute, when such action leaves the office in existence and only brings about the creation of a vacancy to which another may be appointed.

On *certiorari*.

Before Justices GARRISON, PARKER and BERGEN.

For the prosecutors, *John J. Fallon*.

For the respondent, *Frederick K. Hopkins*.

The opinion of the court was delivered by

BERGEN, J. In each of the foregoing cases a rule was allowed requiring the respondent to show cause why a writ of *certiorari* should not be allowed to review a resolution adopted by the common council of the respondent on the 1st day of

January, 1917, rescinding a previous resolution of the council appointing the two prosecutors to the positions of patrolmen and abolishing the positions which they held. On the argument, the cases being argued together, it was agreed by counsel that if the court determined to allow the writs, it should decide the merits of the controversy as if on final hearing without further argument.

It was stipulated that the respondent is incorporated under "An act providing for the formation, establishment and government of towns," approved March 7th, 1895, and has since been governed by the provisions of that act; that the respondent, on April 12th, 1916, adopted an ordinance establishing a police department, which provided that the police force of the town should consist of one policeman (to be called patrolman) for every seven hundred inhabitants of the town; that the two prosecutors were appointed in December, 1916, to fill vacancies, one caused by death and the other by retirement; that the appointments took effect immediately, and the two prosecutors qualified and entered upon the performance of their duties as patrolmen and served as such until January 6th, 1917; that on January 1st, 1917, the respondent adopted a resolution rescinding the resolution appointing the two prosecutors and purporting to abolish the office of patrolman held by the prosecutors; that no charges were preferred against either for incapacity, misconduct, non-residence, disobedience of just rules and regulations, or otherwise, nor was either given a hearing on any charge or charges; that the preamble of the rescinding resolution recited that the police force was sufficient without the appointment of the prosecutors, and that such appointments were unwarranted and imposed an unnecessary and unjust burden on the taxpayers, and that the purpose of the resolution was the promoting of the efficiency of the department and economy in the administration of the town's affairs.

The power of the respondent to provide for the establishment of a police force is to be found in section 50 of an act entitled "An act providing for the formation, establishment and government of towns" (*Pamph. L. 1895, p. 239; Comp.*

Stat., p. 5532, § 375), which declares that the council shall have power by ordinance to establish and provide for the appointment, removal, duties and compensation of a police force, "provided, that such police force (excluding officers) shall not exceed more than one policeman to every eight hundred inhabitants, and provided, further, that no policeman or police officer shall be removed except for neglect of duty, misbehavior, incompetency or inability to serve."

There is nothing in this record which tends to show that the police department of the town of West Hoboken was not lawfully established under the statute above referred to.

It authorizes the establishment of a police force not to exceed one to every eight hundred inhabitants, and to that extent the number of patrolmen is fixed by law, and appointments beyond that number would be unlawful. The fact that the present ordinance fixed the number at one to every seven hundred inhabitants does not destroy the ordinance establishing a police force and leave the municipality without such force, for, if the number of patrolmen is not properly fixed by the ordinance, the statute fixes it, and within that limit all appointments would be legal, and in this case the appointments, including the prosecutors, do not exceed that limit. We are of opinion that the police force was lawfully established.

If the police department was lawfully established, then the statute entitled "An act respecting municipal police departments lawfully established in this state and regulating the tenure and term of office of officers and men employed in said departments," *Pamph. L.* 1915, p. 688, applies. That statute, section 1, provides that in municipal police departments lawfully established in this state, the officers and men employed therein shall hold their offices and continue in their employment "during good behavior, efficiency and residence in the municipality wherein they are respectively employed: and no person shall be removed from office or employment in any such police department or from the police force of any such municipality for political reasons or for any other cause than incapacity, misconduct, non-residence or diso-

bedience of just rules and regulations established or which may be established for the police force in such department." Section 3 of the same act enacts that no person whether officer or employe in any police department shall be removed from office except for a cause provided in the first section of the act, "and then only after written charge or charges of the cause or causes of complaint shall have been preferred against such officer or employe, signed by the person or persons making such charges and filed in the office of the municipal officer, officers or board, having charge of the department in which the complaint arises, and after the charge or charges shall have been publicly examined into by the proper board or authority upon reasonable notice to the person charged, it being the intent of this act to give every person against whom a charge or charges for any cause may be preferred under this act a fair trial upon said charge or charges and every reasonable opportunity to make his defence, if any he has or chooses to make."

This act prevents the removal of any patrolman from a police department for political reasons, or for any other cause except incapacity, misconduct, non-residence or disobedience of rules, and then only after a public hearing upon written charges, and it is not pretended in this case that any charges were preferred or any hearing allowed.

It is urged that when the purpose of the removal of a patrolman is alleged to be in the interest of economy he may be removed arbitrarily by resolution and without a hearing accorded to him. We do not agree to this proposition, for the office cannot be abolished by resolution; it is created either by statute or ordinance and must be abolished in a like solemn manner. If it be granted that the municipality has the power to reduce the number of patrolmen, it must be done by ordinance fixing the number at less than the statutory ratio.

The statute declares, among other things, that the council shall have power to provide by ordinance for the removal of the police force, and there is nothing in this record which shows any such ordinance; all that appears is that the prose-

Cahill v. West Hoboken.90 N. J. L.

cutors, lawfully appointed, are removed from their offices without the hearing which the statute gives them, leaving the offices in existence to be filled with partisans of the majority of the council. If this can be done, then there is nothing to prevent other removals in like manner until the entire force is discharged and their places filled by new appointments, all by resolution of the council. Under such conditions the allegation of economy as an excuse for a removal of an incumbent without a hearing affords an easy means to avoid the statute.

Mr. Justice Scudder, speaking for the Court of Errors and Appeals in *Newark v. Lyons*, 53 N. J. L. 632, said statutes of this class are intended "for the protection of incumbents while the offices continue," and that the power to declare all offices vacant cannot be exercised "for the purpose of appointing another to the vacated office unless it be for good cause shown against the incumbent, for this would be a removal within the prohibition of the statute." In that case it was held that a power existed to abolish useless and antiquated offices, and that "the tenure of the office is qualified by the continuance of the office." In *Sutherland v. Jersey City*, 61 Id. 436; *Paddock v. Hudson Tax Board*, 82 Id. 360; *Van Horn v. Freeholders of Mercer*, 83 Id. 239, and *Boylan v. Newark*, 58 Id. 133, the office was abolished. The rule seems to be settled in this state that while a municipal office may be abolished by the municipality for economical or beneficial reasons, and the incumbent deprived of his office, although protected by a tenure of office statute, that end cannot be accomplished by a removal from office contrary to the terms of such a statute when such action leaves the office in existence and only brings about the creation of a vacancy to which another may be appointed. The resolution under review does nothing more than create a vacancy which the council may at any time fill, and is not supported by the cases, cited by the defendant, holding that an office may be abolished in the public interest even where the incumbent is protected by a tenure of office act.

90 N. J. L.

Fenton v. Atlantic City.

Whether, under any circumstances, in view of the act of 1915 (*Pamph. L.*, p. 688), a police officer can be removed without written charges, and a hearing accorded as provided in that act, it is not necessary to decide in this case, for here the office remains in existence, and the result is the removal of the prosecutors from office without charges, or the hearing to which they are entitled, and without an effective abolition of the offices which they held. The writs will be allowed and the resolution under review will be set aside, with costs to prosecutors.

CHARLES FENTON, PROSECUTOR, v. ATLANTIC CITY,
RESPONDENT.

Submitted July 5, 1917—Decided September 17, 1917.

1. It is not an unreasonable exercise of police power by a city to require an abutting landowner to connect his buildings with a public sewer, notwithstanding he may already have a private sewer. The object of such a health code is the sanitary condition of dwellings, the prevention of disease, and the maintenance of public health, and this may be done by the prevention of nuisances as well as their abatement.
2. It is no answer to a prosecution for the violation of an ordinance requiring that adjacent buildings be connected with a public sewer, that it discharges in the same body of water as the private sewer, and an offer to prove that fact was properly overruled.
3. Anything injurious to public health may be a nuisance, and it is as much the duty of a board of health to prevent a condition likely to be detrimental to public health, as to abate it after its evil consequences appear.

On *certiorari* to review conviction of violation of health code of Atlantic City.

The facts applicable to this case, not disputed, are that defendant owns property in Atlantic City fronting on a street in which there is a sewer for the use of all property along it requiring the disposal of sewage matter; that the defendant's

Fenton v. Atlantic City.

90 N. J. L.

property runs from this street to a body of water called "Thoroughfare;" that it requires sewage disposal facilities now afforded by a pipe from the buildings thereon, which empties in the Thoroughfare on defendant's land, distant over two hundred feet from the buildings; that the city has an ordinance requiring all property owners to connect buildings abutting on streets "on which a sewer is laid" within thirty days after notice by the health officer directing that such buildings be connected therewith; that defendant was given the proper notice and refused to connect his buildings with the sewer in the street, and that the sewer was constructed and maintained by a private corporation open to the use of property abutting the streets through which it was laid. The defendant was prosecuted for a violation of the ordinance and convicted, and thereupon the proceedings and judgment were brought here for review by a writ of *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Clarence L. Cole*.

For the respondent, *Harry Wootton* and *Joseph B. Perskie*.

The opinion of the court was delivered by

BERGEN, J. The first point made by the prosecutor in support of this writ is that the complaint does not allege that prosecutor was maintaining a nuisance. It is not necessary that the health officer should wait until a nuisance existed and the public health put in jeopardy before requiring defendant to connect with the sewer. It is within the reasonable exercise of police power to prevent disease by the enforcement of a proper sanitary regulation such as this. It also appears in the record that when the question was raised by the prosecutor in the court below, counsel said: "We waive any question of the complaint being defective." This disposes of the first objection adversely to the prosecutor.

It is next urged that it was error to overrule proof offered by the prosecutor that the refuse from the sewer was de-

90 N. J. L.Fenton v. Atlantic City.

posited in the same flow of water as that in which defendant was then discharging his sewage through his private pipe line.

This, we are of opinion, was properly overruled because the place of final deposit in no way affects the reasonableness of the requirement to connect with the sewer. It is the sanitary condition of the buildings required to be connected with the sewer which is the primary object, and this may well be better accomplished by a sewer under public inspection rather than by numerous sewers under private control, although all discharge in the same stream at different points. It is not a question where the disposal is to take place, but whether the requirement that all buildings abutting a sewer shall be connected with it is a reasonable one. We think that the required use by all adjacent property owners of a single sewer constructed on sanitary principles is not unreasonable, although such enforced use compels the abandonment of private sewers discharging in the same body of water, and that therefore it is immaterial where the public sewer empties, especially when, as in this case, the sanitary condition of the public sewer is not questioned.

The next point is that the place of deposit by prosecutor is beyond the limits of the city of Atlantic City. This we consider of no consequence. The buildings and a portion of defendant's pipe are within the city, and the health of the city depends upon the sanitary condition of the defendant's dwelling-house and private sewer within the city. The transportation of garbage by defendant through the city, if forbidden by ordinance, could not be justified upon the ground that he intended to deposit it beyond the city limits. What he now contends is that he may use private pipes, not subject to sanitary inspection, to carry garbage within the city with impunity because he deposits it beyond the city line.

We do not consider the proposition has any legal merit.

The only other point argued is that as the sewer belongs to a private corporation, and there being no proof that defendant is maintaining a nuisance, the sanitary code cannot be enforced against him. The prosecutor does not insist that if

Horner v. Margate City.90 N. J. L.

he was maintaining a nuisance he could not be compelled to connect with the sewer, although maintained by a private corporation for public use, but rather that he should not be required to use it until it had been demonstrated that its non-use creates a nuisance. As we have said, in the earlier part of this opinion, it is a proper exercise of the police power in the interest of public health, as well as its duty, to prevent a condition likely to be detrimental to public health as much as it is to abate such condition after its evil consequences appear, and a board of health would meet with merited condemnation if it stood by and took no steps to provide, by the exercise of ordinary prudence, a sanitary condition which would prevent an epidemic of disease likely to grow out of known conditions.

Anything which is injurious to health may be a nuisance, and we cannot say that a private sewer over two hundred feet in length, used for sewage disposal, although used for a single dwelling, is not injurious to the public health, at least we cannot be so conclusively certain of it as to warrant us in saying that the action of the board of health in causing its abatement was erroneous.

The judgment will be affirmed, with costs.

JOHN G. HORNER, RECEIVER OF WEST JERSEY MORTGAGE COMPANY, PROSECUTOR, v. BOARD OF COMMISSIONERS OF MARGATE CITY ET AL., RESPONDENTS.

Argued June 6, 1917—Decided June 19, 1917.

Under the act entitled "An act for the assessment and collection of taxes" (*Pamph. L.* 1903, p. 394) there is no limitation as to the lien of a tax assessed on lands against the owner, at least so long as he continues to be the owner, and a taxing district has, in such case, the right to enforce the payment of taxes assessed against the owner although the sale is not made, or attempted to be made, within two years of the twentieth day of December of the year for which the taxes are assessed.

90 N. J. L.Horner v. Margate City.

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Harvey F. Carr*.

For the respondents, *Joseph Thompson*.

The opinion of the court was delivered by

BERGEN, J. In this cause a writ of *certiorari* was allowed to review a resolution of the defendant corporation directing its tax collector to sell lands for taxes in arrears.

The record is so meagre that it is doubtful whether the precise question is presented in it, but we think it sufficiently supplemented by admissions on the argument and the briefs of counsel to justify the consideration of the real question in dispute, which is, Does the lien against the land for unpaid taxes expire, in favor of the owner, at the end of two years from the date when they are payable, where the owner, against whom the assessment was levied, still holds the title? The facts, as we find them from the record and admissions of counsel, are substantially as follows: In 1912, the Ventnor syndicate was the owner of a tract of land in Margate City, of which it is still the owner; in that year a tax was assessed against the land in the name of the owner which became payable December 20th of that year, and is not yet paid; that October 9th, 1916, the city passed a resolution directing the sale of the land to make the taxes in arrears, which is the resolution under review; that the collector advertised the land for sale on April 10th, 1917; that February 21st, 1912, the Ventnor syndicate mortgaged the land to the West Jersey Mortgage Company for \$5,000, and the latter company, being decreed to be insolvent, the prosecutor was appointed its receiver October 1st, 1915.

While we have concluded to consider the merits of the question presented, we do not thereby wish to be understood as conceding the right of a mortgagee to challenge the legality of a tax assessed in the name of the owner against the mort-

Horner v. Margate City.

90 N. J. L.

gaged premises, under such conditions as are present in this case, for it may well be that even if the lien has expired as to the mortgagee, it might remain a lien against the interest of the owner sufficient in value in excess of the mortgage to raise the sum due for unpaid taxes, and that if the lien had lapsed as to the mortgagee a sale of the owner's interest would not affect the mortgagee's lien. This question we do not pass on, for it is not raised, and defendant makes no objection to the prosecutor's standing.

The only reason filed by the prosecutor is that "the lien created" by the act of 1903 (*Pamph. L.*, p. 394; *Comp. Stat.*, p. 5075) "has expired, and the defendants, in consequence, have no right or power to sell the said lands and can convey no valid title thereto."

This raises but one question, and the only one argued, viz., Is there any limitation to the lien for taxes on the land against which they are assessed and levied where there has been no subsequent conveyance by the owner? We are of opinion that under the act of 1903, *supra*, there is no limitation for the lien for taxes, so far as the owner is concerned, against whom the tax was levied, at least so long as he retains the title. Prior to 1854 we had no statute making taxes a lien on land or limiting the lien for taxes. In that year (*Pamph. L.*, p. 429) an act was passed which provided, section 2, that an assessment for taxes against any person residing out of the state, or of corporations residing out of the county where the lands were located, should be a lien on the lands for the "space of two years," from the time when they were made payable, and in 1863 (*Pamph. L.*, p. 497) this was extended to all persons and corporations whether resident or not. This limitation was maintained in all subsequent statutes relating to the subject until the general revision of the Tax act in 1903, so, that under the statutes prior to 1903, taxes were made a lien on the land against which they were assessed for the space of two years after they were payable, except, since 1888 (*Pamph. L.*, p. 372), when all taxes were made a first and paramount lien for the space of two years from and after December 20th in each year, to

90 N. J. L.

Horner v. Margate City.

which all conveyances, mortgages and other liens were subservient, and our courts, in construing this legislation, have uniformly held that the lien imposed expired at the end of two years from the due day. *Johnson v. Van Horn*, 45 N. J. L. 136; *Poillon v. Rutherford*, 58 Id. 113; *Hohenstatt v. Bridgeton*, 62 Id. 169. With this statutory limitation regarding taxes continued in our law for a period of forty years, together with its judicial construction before it, the legislature, by the act of 1903, *supra*, deliberately eliminated the limitation of the lien of taxes, and expressly repealed, by *Pamph. L.* 1903, p. 436, all the legislation relating thereto, and by section 49 of the revised act of 1903 declared that all unpaid taxes should be, after the 20th day of December next after the assessment, "a first lien on the land on which they are assessed, and paramount to all prior or subsequent alienations and the descents of the said land or encumbrances thereon, except subsequent taxes." Section 50 of the act requires the collector of each taxing district to file, on or before the first Tuesday of February in each year, with the county clerk, except in cities having charter provisions for a public record of tax liens on land, a list of all unpaid taxes assessed the preceding year on real estate in his taxing district, setting forth against whom assessed, the description of the property and the amount of taxes assessed thereon, arranged alphabetically in the names of the owners, and then declares that "the said list when filed and the record thereof shall be constructive notice of the existence of the tax lien for two years from said first Tuesday of February, but not thereafter against any parcel unless within said term of two years the sale of said parcel shall be noted in the record."

The same section further provides that a purchaser or mortgagee in good faith after the said first Tuesday of February, whose deed or mortgage is recorded before the collector has filed his list, shall hold his title free from the tax lien. The radical change made by this statute is that the lien of taxes is no longer subject to any limitation; they are made a lien paramount to all conveyances or mortgages except such as are taken after the first Tuesday in any February and recorded

before the collector has filed his list. This was manifestly adopted to protect innocent purchasers and mortgagees in good faith against the default of the collector in not filing his list on the day required by law, but they are not protected if recorded after the list has been filed, so, that if such purchaser or mortgagee finds no list on file showing taxes in arrears against the land when he records his conveyance or mortgage, he may safely accept either. That part of section 50 relating to the limitation of constructive notice to two years does not destroy the tax lien in favor of an owner, for he has actual notice that he has not paid his taxes, and the legislature could not have intended to do away with the actual notice which he had, and put in its place a constructive notice, which is one which the law implies and charges him with in absence of actual notice.

This limitation of constructive notice only applies to persons who deal with the land without notice of any tax lien.

As to such persons the list filed is a notice which the law implies they have, but this implication fails, by force of the statute, after the lapse of two years from the beginning of the lien, after which the list is not constructive notice to a purchaser or mortgagee of the tax lien, and if he finds no list on file, or a sale noted, within two years, he may assume that there are no taxes in arrears which are a lien upon the property. It may well be doubted whether this statute applies in any case where the conveyance or mortgage is recorded prior to the assessment, for, as was said by Mr. Justice Dixon, in *Robinson v. Hulick*, 67 N. J. L. 496: "All persons interested, or about to become interested, in lands in New Jersey, are chargeable with notice of these laws and of their normal operation. Every purchaser or mortgagee of such land must therefore be deemed to have notice of the taxes which become a lien upon that land on every 20th day of December after he acquires his interest."

We are inclined to think that the statute with reference to the constructive notice to be derived from the filed list was intended for the protection of persons intending to become interested in the land, and that as to them the list is not a

90 N. J. L.Kelly v. Freeholders of Essex.

constructive notice for more than two years after it is filed, so, that if in searching the record, he finds no list containing an assessment unpaid against the land, he is not chargeable with notice of any assessment, although filed, which is not within the limited period, but if this be not sound, we are of opinion that the limitation of the effect of the constructive notice provided by the statute does not apply where the owner had actual notice of a tax levied during his ownership, and that, so far as he is concerned, the tax remains a lien upon his land without limitation by any statute.

The result which we reach is that the prosecutor can take nothing by his writ and that it should be dismissed, with costs.

**JAMES F. KELLY, PROSECUTOR, v. BOARD OF CHOSEN
FREEHOLDERS OF THE COUNTY OF ESSEX ET AL.,
RESPONDENTS.**

Argued June 6, 1917—Decided June 19, 1917.

- A municipality cannot lawfully reject the bid of the lowest bidder, where the law requires the awarding of a contract to the lowest
- responsible bidder, upon the ground that he is not responsible, without giving him a hearing, and a finding that he is not responsible rested upon proper facts.
-

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Ralph E. Lum*.

For the respondents, *Harold A. Miller*.

The opinion of the court was delivered by

BERGEN, J. The respondent the board of chosen freeholders of the county of Essex advertised for bids for the plumbing

and gas fitting work necessary for a greenhouse and a gardener's cottage connected with a county hospital.

The prosecutor was the lowest bidder by one dollar, but the contract was awarded to the next highest bidder, and it is to review this award that the writ of *certiorari* was allowed in this case. The difference in the bids is small, but the principle involved is applicable to all bids and cannot be evaded because, in this instance, the amount is small, for the controlling legal rule must be applied in all cases without regard to sum involved. The minutes of the meeting of the board at which the bids were opened and considered show that after the bids were opened the architect reported that the bid of James F. Kelly was the lowest, and that thereupon it was "moved that on account of the unsatisfactory work done in the past by this firm for the county, that the bid be rejected. Seconded and carried," and that then the contract was awarded to the next highest bidder. The testimony taken in support of this action justifies the inference that a firm with whom the prosecutor was at one time connected had not satisfied the board with regard to work which it had done for it, but, so far as the testimony goes, it affords no ground for any inference that prosecutor was responsible for the ground of complaint, but, assuming that his bid was rejected upon the ground that the board did not consider him a responsible bidder, the action was taken without giving him a hearing or making a finding that he was not a responsible bidder. The board has no right to arbitrarily reject a bid on that ground. The bidder has a right to be heard and to a determination of the question, which must have the support of proper facts in order that the rejected bidder may have an opportunity to review the action taken and the sufficiency of the proof upon which it is rested.

In *Faist v. Hoboken*, 72 N. J. L. 361, this court said: "If there be an allegation that a bidder is not responsible he has a right to be heard upon that question, and there must be a distinct finding against him, upon the proper facts, to justify it," and in *Harrington's Sons Co. v. Jersey City*, 78 Id. 610, Mr. Justice Swayze said: "If the provisions had been that the

contract should be awarded to the lowest responsible bidder, it would have been necessary, before deciding adversely to the prosecutors on that question, to give them a hearing." This holding was approved by the Court of Errors and Appeals, on appeal of the same case, *Id.* 614. The law has thus been settled in this state that before the lowest bid can be rejected, where the statute requires that a contract shall be awarded to the lowest responsible bidder, upon the ground that such bidder is not responsible, without giving him a hearing, and a distinct finding against him that he is not a responsible bidder upon facts which warrant such a conclusion. No such hearing was afforded the prosecutor in this case, nor was there any determination that he was not a responsible bidder, based upon proper facts, and therefore the resolution awarding the contract, and the contract made in pursuance of the award, will be set aside. The respondent relies in justification of its conduct on *McGovern v. Board of Works*, 57 *Id.* 580, but that case involved an entirely different statute requiring the awarding of the contract to the lowest bidder giving satisfactory proof of his ability to furnish the materials and perform the work properly, and to offer security for the faithful performance of the contract, which is quite different from the present act requiring the award to be made to the lowest responsible bidder, a distinction pointed out by Mr. Justice Garrison, in speaking for the Court of Errors and Appeals, in the Harrington case. And in the *McGovern* case Mr. Justice Lippincott said that if the charter of the city of Trenton provided that contracts "should be awarded to the lowest bidder, the action of the governing board in this matter would be set aside as an unauthorized exercise of power," and when we have added only that the lowest bidder shall be responsible, our courts have held that the question of responsibility is one of fact to be decided only after the bidder has been heard.

In addition to this, the rejected bidder was, in the case last cited, accorded a hearing with the assistance of counsel.

It is to be regretted that the municipality may be put to additional expense in readvertising and awarding another contract, but we can find no way to avoid it. The responsibility

Martin v. Woodbridge.

90 N. J. L.

for it rests with the public board which disregarded a settled rule of law, by action, which, if approved, would nullify the statute and permit its willful avoidance by the arbitrary action of municipal bodies, for, if permitted where the difference is one dollar, the same principle would apply to a like unauthorized action if the difference was thousands, and permit favoritism in the awarding of all contracts.

The prosecutor may enter an order setting aside the resolution awarding the contract and the contract rested upon it.

**ALBERT MARTIN, AND EPHRAIM CUTTER, EXECUTOR OF
THE LAST WILL AND TESTAMENT OF SAMUEL DALLY,
DECEASED, PROSECUTORS, v. THE TOWNSHIP OF
WOODBIDGE, IN THE COUNTY OF MIDDLESEX, AND
VALLEY COMPANY, RESPONDENTS.**

Argued June 6, 1917—Decided June 19, 1917.

1. Where lands have been sold by the proper officer to make taxes in arrears levied against land under the provisions of section 53 of the act of 1903 (*Comp. Stat.*, p. 5134), it is lawful to add to the taxes in arrears for the current year, to make which a sale has been ordered, all arrears of taxes for which the land has been sold and purchased by the taxing district to the extent necessary to pay the cost of redemption, whether the taxes accrued prior to the date when the act of 1903 went into effect or thereafter.
2. The fact that the township clerk in furnishing the collector with a statement of all taxes in arrears erroneously included an installment of a sewer assessment not yet due, will not vitiate the sale when it appears that the collector before making the sale corrected the error by deducting the installment and did not include it in the amount for which the sale was made, nor will the fact that the clerk included in the amount certain costs not properly chargeable make the sale illegal if in fact the sum for which the land was sold was not more, excluding the fees, than the true amount due.
3. Proof by the collector making the sale that he posted advertisements thereof in five of the most public places of the taxing district, is not overcome by the fact that two of the places were sometimes closed during business hours.

90 N. J. L.Martin v. Woodbridge.

4. It is not necessary that the notice of sale for unpaid taxes put up by the collector shall contain a statement that the land will be sold in fee if no one should bid for a shorter term. The statute makes it the duty of the officer to make the sale in fee if no one shall bid for a shorter term, and it is not necessary to advertise the terms of the statute.
-

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutors, *Charles C. Hommann*.

For the respondents, *J. H. Thayer Martin*.

The opinion of the court was delivered by

BERGEN, J. On the 31st day of July, 1916, the collector of the township of Woodbridge, in the county of Middlesex, sold at public auction a parcel of real estate for unpaid taxes to the defendant Valley Company, in fee, for the sum of \$2,077.13, and thereupon issued to the purchaser a certificate of the sale as authorized by statute. The prosecutors were allowed a writ of *certiorari* to review the proceedings upon which the tax certificate is based, and also for an order setting aside the sale and certificate. The material facts, which are not in dispute, are as follows: The land was assessed in the name of the owner, Charles S. Demarest, for the years 1894 to 1911, inclusive, and in the name of the estate of Samuel Dally for the years 1912 to 1915, inclusive; that in 1895 the land was sold for taxes assessed for the year 1894, and were also sold in 1898, 1900 and 1908 for the taxes of the next preceding year, the township in each case being the purchaser. The sales in 1895, 1898 and 1900, being for the period of thirty years, and those of 1904 and 1908 being in fee. After the foregoing sales the township continued to levy the taxes against the land in the name of the owner and no taxes being paid after the sale of 1908, nor the land redeemed from the effect of the prior sales, the township committee, March 15th, 1916, adopted a resolution directing the collector to sell the land

Martin v. Woodbridge.

90 N. J. L.

to raise the taxes levied for the year 1914 and for all other taxes in arrears.

The township clerk certified to the collector the amount of unpaid taxes for the years 1894 to 1915, inclusive, and also an unpaid sewer assessment. When the collector came to make the sale it was found that of the sewer assessment \$33 was not then due and the collector deducted that sum from the amount certified and added to the balance thus ascertained, the expenses and costs of the sale, making a total of unpaid taxes, interest, sewer assessment and expenses of \$2,077.13 for which the land was sold and purchased by the Valley Company.

The sale was made by virtue of section 53 of the Tax act of 1903 (*Comp. Stat.*, p. 5134), which provides that where land has been sold and purchased by a taxing district, the subsequent taxes shall be levied as if no sale had been made and shall remain a paramount lien on the land, and that no further sale shall be made unless directed by the governing body of the municipality assessing the taxes, in which case the clerk of the taxing district shall certify to the collector the amount required to be paid to redeem the land from the previous sales, and that the collector shall sell the land for the amount thereof to be added to the tax for the current year. In the present case, the sale was made for taxes levied in the year 1915, and to it was added all unpaid taxes, the result being to raise a sufficient sum to pay all taxes in arrears and also to redeem the land from the prior sales to the taxing district.

The first reason which the prosecutor argues why this tax sale should be set aside is, that the certificate of the township clerk of the amount to be added to the current taxes included the tax for the years between 1894 and 1903, the date of the act which permitted the adding of anterior unpaid taxes to those of the current year for which the sale was to be made, it being urged that the act of 1903 had no application to taxes accrued previous to that date, because, although section 53 of the act of 1903 declares that "where a parcel of land has been purchased and is held by the taxing district under a tax sale

not redeemed, all subsequent taxes * * * shall be and remain a paramount lien on the land and be added to the purchase-money and shall be paid before the land can be redeemed from the sale," it is provided by section 66 (*Comp. Stat.*, p. 5141), "this act shall take effect on the 20th day of December, 1903, and its provisions shall extend to proceedings on and after that date relating to taxes assessed in the year 1903, but not to proceedings relating to taxes assessed in prior years." Section 66 appears to be a legislative declaration that the act of 1903 shall not apply to proceedings relating to taxes theretofore assessed, and that the collection of prior unpaid taxes cannot be enforced in the method provided by section 53, which relates to cases where, at a prior tax sale, the taxing district became the purchaser. By the statute of 1902 (*Pamph. L.*, p. 447) all unpaid taxes assessed after the 1st day of January, 1898, were made a first lien for and during the period of five years next after the date on which they become delinquent, and by section 2 of the same act taxes thereafter assessed were made a paramount lien for five years, but this act was repealed in 1903 (*Pamph. L.*, p. 446), with the proviso that the repealer should not effect the proceedings or remedies relating to taxes assessed prior to 1903. The effect of this repealer was to restore the status existing prior to its adoption, the limitation of five years being removed, and the proceedings and remedies relating to taxes assessed prior to December 20th, 1903, restored.

By the statute of 1879 (*Pamph. L.*, p. 298; *Comp. Stat.*, p. 5188), it was enacted that where real estate theretofore or thereafter sold, for non-payment of taxes, assessments or water rents was purchased by the taxing district, or by any person in its behalf, subject to the right of redemption, the taxes, assessments and water rents should continue to be assessed upon the land for subsequent taxes, but that it should not be necessary to sell the land for non-payment, and that such taxes and assessments should remain a first lien upon the lands to be paid before it could be redeemed, but this does not provide for a sale for unpaid taxes for which a sale had been made, so the situation is, that as to taxes assessed prior

to 1903, and for which the land assessed had been sold and purchased by the taxing district, the right of redemption and not of resale existed, and the only question now presented is whether in making a sale under section 53 of the Tax act the cost of redemption may be added to the amount of the current taxes for which a sale is to be made. We do not perceive any difference between selling to make a current tax subject to a right of redemption from a prior sale, and a sale to make current taxes which shall include the amount necessary to pay the redemption fee. The sale made under the act of 1903 is in fee unless the bidder will take it for a shorter term, and the purchase of a fee, subject to the cost of redemption, would require the payment of the latter cost, for it cannot be assumed that the legislature ever intended by implication what it has not expressly declared, viz., that a sale of land for unpaid taxes for a current year under the act of 1903 would deprive the taxing district of its right to claim, and be paid the taxes in arrears for which it had purchased the land and was holding subject to the owner's right of redemption. We are therefore of opinion that when a sale of land is made under the act of 1903, the taxing district may add to the current tax, for which a sale is about to be made, the amount required to be paid to redeem the land from the effect of all prior sales at which a taxing district became the purchaser. In matters of taxation all doubtful questions must be resolved in favor of the right of the state to enforce the payment of taxes levied to sustain the government.

The next point is, that as some of these taxes are more than twenty years in arrears there is a presumption that the tax has been paid. In support of this we are referred to *In re Commissioners of Trenton*, 17 N. J. L. J. 23, in which it is reported that Mr. Justice Abbett said that as to taxes "a presumption of payment arises after an absence of twenty years if there is no evidence to repel it and to show that the debt is still unsatisfied." Without conceding that such a presumption arises against the state, it is a sufficient answer in this case to say that such a presumption, if it exists, is rebutted by the admitted fact that none of the taxes now in dis-

90 N. J. L.Martin v. Woodbridge.

pute have ever been paid. But aside from this all of these taxes beyond the twenty-year limit have been enforced by a sale and purchase by the taxing district for the period of thirty years which has not yet expired, and therefore it is still the owner subject to the owner's right of redemption if that right has not yet expired.

The next reason argued is that the certificate of the clerk included an installment of a sewer assessment amounting to \$33, not yet payable, and that this amount, although deducted by the collector before the sale, was included in the certificate of the clerk. It is not denied that this amount was not included in the sum for which the sale was made, and the mere fact that there was a mistake in the amount claimed in the certificate of the clerk, which was corrected before the sale and it made for the true amount, will not vitiate the sale, for the owner was in no way injured because he could have redeemed before the sale by paying the correct amount for which the sale was made.

Another reason urged is that the certificate of the clerk included certain items of cost which were greater than that allowed by law—that is, that forty cents was charged in each case as a fee in excess of the legal amount. This does not make the sale illegal when it appears, as it does here, that the amount for which the property was sold, owing to other slight miscalculations, was not more than was due the township, excluding these alleged illegal fees, there being nothing to show that the owner offered to redeem for any sum due less these fees or that he made any objection thereto prior to the sale, or that he is now willing to redeem by paying the amount due.

The next reason urged is that the lands could not be advertised for sale to make the taxes of 1915 until after July 1st, 1916, prior to which time the land could not be sold for unpaid taxes for the year 1915. This claim is not sound, for there is nothing in the statute which prevents the advertising of the land for sale prior to the 1st day of July in each year: all that the statute forbids is a sale prior to that date, and in this case a sale was not made until after that date.

The next reason urged is that the advertisements of the sale were not put up in five of the most public places of the taxing district. It is not urged that the places were not public in the general sense of that word, but that two of the places were sometimes closed during business hours. The affidavit of the collector sets out that they were set up "in five or more of the public places of said township," as follows: one on a pole on the north side of Green street, "in front of the premises described in said notice," one in the post office, one in the printing office, one in a real estate office, one in a grocery store and one in the public room of a hotel, giving the name of each. We think this is sufficient proof, and must be taken as true, unless it is rebutted in a more substantial manner than appears in this case. They are all, in a fair sense, public places, and should be taken as such under this proof in the absence of anything which conclusively shows that they were not such public places as satisfies the law. What is a public place would depend upon the state of mind of anyone objecting to a public sale by any officer which required the posting of such notices.

The next reason urged is that the notice of sale did not state that the land would be sold in fee if no one would bid for a shorter term. Such a statement in the advertisement of the sale is not necessary, for the law fixes the duty of the officer which is to sell in fee unless some bidder at the sale is willing to pay the arrears in consideration of an estate less than a fee, and the report expressly states that no person bid for a shorter term than a fee, nor was it necessary, as next urged, that the return of the collector should state that it was required to sell the whole of the land, for that sufficiently appears, when, as he did, he reports he sold the entire tract to make the arrears.

The next and last reason urged is that the affidavit of mailing does not state that a copy of the advertisement was mailed to the owner of the land. The land belonged to the estate of Samuel Dally, deceased, of whose will Ephraim Cutter was the executor, and his affidavit shows that he mailed to Cutter as the executor of the estate of Samuel Dally, deceased, as-

90 N. J. L.Splitdorf Electrical Co. v. King.

sessed as owner, a copy of the notice which was enclosed in an envelope, with the postage prepaid, addressed to the said Ephraim Cutter; this is sufficient.

There not appearing in this record any sufficient reason why the certificate of sale should be set aside, the proceedings and sale will be confirmed, with costs.

SPLITDORF ELECTRICAL COMPANY, PROSECUTOR, v.
ANNA KING ET AL., RESPONDENTS.

Submitted July 5, 1917—Decided September 17, 1917.

1. An illegitimate child of the daughter of an injured workman is not a dependent of the daughter's father as defined in the Workmen's Compensation act of this state.
 2. The illegitimate child of a deceased workman's daughter is not a grandchild of such workman within the meaning of the statute.
-

On *certiorari* to review an order of the Court of Common Pleas of the county of Essex awarding compensation under the Workmen's Compensation act.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Kalisch & Kalisch*.

For the respondents, *William P. Murphy*.

The opinion of the court was delivered by

BERGEN, J. The petition for compensation in this case was filed by a daughter of a deceased workman on behalf of herself and her illegitimate child. The trial court properly decided that the daughter, because of her age, was not a dependent, but held that her illegitimate child was a grandchild within the statutory definition, and therefore entitled to com-

pensation, and judgment was thereupon entered according to such finding, to review which a writ of *certiorari* was allowed. The proofs in the case show that the daughter was not living with her father when her child was born, but that after that event she took the child to the place where her father was living; that an additional room was leased; that the father paid her \$8.50 a week for room rent and board, taking only one meal a day except Sundays, and that out of this the daughter paid the rent, \$5.50, using the balance for food; that the father occasionally gave her extra money, and that at the time of his death her sister boarded with her, paying \$4 a week. This is the only proof of assumption by the father of any responsibility for the support of the illegitimate child of his daughter, and it is not sufficient to raise a presumption that he was treating such child as a dependent even if that be sufficient under our statute, which we think it would not be. The right to this class of compensation is the creature of the statute and cannot be extended by judicial construction in opposition to the words of the act. By the amendment of the act (*Pamph. L.* 1913, p. 302) the term "dependents" is made to apply to and include a designated class of persons, among them being "grandchildren, posthumous children (and) illegitimate children," the latter to be presumed to be dependent when they are a part of the decedent's household. There is nothing in the statute making the illegitimate children of an injured workman's child his dependents unless they fall within the class denominated grandchildren within the meaning of the statute. The court below held that such a child was a grandchild.

We are of opinion that this was erroneous, for at common law a bastard was *nullius filius*, and if not a child of anyone could not be a grandchild. Our statute permitting inheritance between a mother and her illegitimate child does not establish any relationship between such child and the parents of its mother, nor can such child inherit from the mother's ancestors, for, except as changed by the statute, the common law prevails.

The Workmen's Compensation act imposes new and exten-

90 N. J. L.Browne v. Hagen.

sive obligations upon the employer of workmen in favor of the latter's dependents and expressly defines who are to be included as dependents, among them being the illegitimate children of the workman residing in his family, to whom he owes the duty of maintenance, and to impose a further obligation on the employer, not provided for by the statute, would be legislation and not judicial construction.

In the absence of anything to the contrary we must conclude that when the legislature made use of the descriptive term "grandchildren," it used it in its ordinary sense and as applicable only to persons who stood legally in that relation to the decedent workman, and not as intending to alter the common law rule by making one who could not stand in such relation a grandchild. The legislature had in mind the question of illegitimacy, for it provided for the illegitimate children of the decedent, but went no further, and we are now asked to supply what it omitted by construing the law to include among grandchildren those who have no such legal status.

If the legislature had intended that the bastard children of a decedent workman's children were his dependents, it could readily have said so, and having omitted to include such persons among the class of dependents entitled to the benefit of the act, the court cannot supply the omission by what would clearly be the exercise of a legislative function.

The judgment will be reversed and a new trial awarded.

ALEXANDER BROWNE, RELATOR, v. ORVILLE R. HAGEN,
RESPONDENT.

Argued April 14, 1917—Decided May 10, 1917.

Where the incumbent of the office or position of health officer of a city brought a writ of *certiorari* to set aside a decision of the civil service commission, that another person be reinstated to the office or position, and the court of first instance fully considered the

Browne v. Hagen.

90 N. J. L.

relative rights of the two persons, deciding that the incumbent was not entitled to hold the office or position but that his opponent was, and dismissed the writ, and on appeal the appellate court affirmed the judgment of the lower court on the ground that *certiorari* was not the proper remedy, and that the most the incumbent was entitled to was a *mandamus* to the civil service commission to certify his compensation; in a subsequent proceeding to determine the right to the same office, in the same court, the doctrine of *stare decisis* will be applied, and the right to the office or position will be determined in accordance with the prior decision.

On information in the nature of *quo warranto*. On demurrer to information.

Before Justice MINTURN, by consent.

For the relator, *Ward & McGinnis*.

For the respondent, *William I. Lewis*.

The opinion of the court was delivered by

MINTURN, J. The relator in this information bases his claim to the office of health officer of the board of health of the city of Paterson upon the following facts, which are substantially conceded by the litigants: On the 10th of November, 1903, the relator was by the board of health of the city of Paterson appointed health officer, and thereupon entered upon the discharge of his duties; that on the 13th day of November, 1906, he was reappointed for the term of three years; that on the 12th of November, 1909, he was reappointed by said board of health for the term of three years and until a successor should be appointed. In 1912, owing to a dead-lock in the board of health, no appointment was made and relator continued to hold over in office.

At the general election, in November, 1912, the city of Paterson adopted the provisions of the Civil Service act of 1908, and thereafter the position of health officer was classified as being within the competitive class, and relator accordingly held said position during good behavior, and was remov-

90 N. J. L.

Browne v. Hagen.

able for cause only; that he was never at any time removed for cause, but Dr. Clay was elected to succeed him.

Relator further avers that on the 14th day of November, 1916, the said Thomas A. Clay resigned as health officer, and thereupon the said board of health at a regular meeting held on the 14th day of November, 1916, elected, or attempted to elect, and did formally declare to be elected, one Orville R. Hagen, the respondent, for an unexpired term of three years, to which they had elected, or attempted to elect, the said Thomas A. Clay; that the said Orville R. Hagen thereupon took possession of said office and has ever since been recognized by the board of health as its health officer, and is now performing, or pretending to perform, all the duties of said office.

That the said Orville R. Hagen, during the time aforesaid, has usurped, intruded into and unlawfully held, used and exercised the office, and yet does intrude into and unlawfully hold and exercise the office to the exclusion of the said J. Alexander Browne.

The information is filed under the provisions of section 4 of the *Quo Warranto* act (*Comp. Stat.*, p. 4212), and may be disposed of under the provisions of the act of 1895 (*Pamph. L.*, p. 82), which now appears as section 12 (*Comp. Stat.*, p. 4214), which gives respondent the right to put the title of the relator in issue. The respondent has raised such issue by demurrer to the information. This was the practice followed in *Haight v. Love*, 39 N. J. L. 14, 476; *Anderson v. Myers*, 77 *Id.* 186; *Dunham v. Bright*, 85 *Id.* 391; *Civil Service Commission v. O'Neill*, *Id.* 92; *Bonyng v. Frank*, 89 *Id.* 239.

The claim of the relator is that by virtue of his tenure of office, as it existed upon the adoption of the Civil Service act in Paterson, he became, upon and by virtue of such adoption, vested with a tenure "during good behavior and was removable for cause only."

In determining the legal question presented by this information, I am naturally confronted with the inquiry as to what legal effect is to be attributed to the deliverance of Mr.

Justice Parker, speaking for this court in the case of *Clay v. Civil Service Commission*, 88 N. J. L. 502. That case was upon *certiorari*, and in effect determined that the relator was regularly appointed to the office in question, and that his tenure thereof was protected by the Civil Service act, and the classification made thereunder, and that as the result of such appointment and tenure, the attempted appointment of Dr. Clay to the same office was necessarily invalid. This information discloses no change in the situation presented to the court in that case, excepting the fact that the respondent claims to have succeeded by appointment to the status occupied by Dr. Clay; otherwise, the status of the parties in fact remains unchanged. The inherent difficulty in accepting the pronouncement of the Supreme Court as dispositive of the rights of the respective parties to the litigation arises not from any change in status, but entirely from the fact that the Court of Errors and Appeals upon review affirmed the result reached by the Supreme Court, but upon different grounds.

The *ratio decidendi*, in the Court of Errors and Appeals, was that the remedy invoked by *certiorari* to test the validity of the ruling of the civil service commission was inappropriate and without legal warrant; and that the utmost protection to which Dr. Clay was entitled against the alleged illegal action or inaction of the civil service commission, in refusing to certify his compensation, was a resort to the writ of *mandamus* to compel the performance of a statutory duty. *Clay v. Civil Service Commission*, 89 N. J. L. 194.

This conclusion, manifestly, left the meritorious question *inter partes* with which this court dealt untouched; and its value as a controlling precedent therefore upon this application presents the initial and fundamental difficulty which confronts me.

I am inclined, however, to accept the Supreme Court determination as finally dispositive of the rights of the parties upon this information. I must assume, in consonance with the opinion, that that court upon consideration of the facts herein presented, adjudicated the respective rights of the parties to the office in question.

90 N. J. L.

Fairview Heights Cemetery Co. v. Fay.

The fact that the adjudication was reached through the medium of an inappropriate legal vehicle of transmission may affect its value in an appellate tribunal, but the essential value of any precedent is the cogency and applicability of its reasoning to the situation *sub judice*; for, with Coke, we must conclude *ratio legis est anima legis*. 7 Co. 7. Or, as expressed by a more modern commentator, "adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason." 1 Kent 473.

The result is that upon the doctrine of *stare decisis*, I am of the opinion that the relator in this information is legally entitled to the possession of the office in question, and that a judgment of ouster upon this demurrer should be entered against the respondent.

FAIRVIEW HEIGHTS CEMETERY COMPANY, PROSECUTOR,
v. THOMAS FAY, COLLECTOR, ETC., RESPONDENT.

FAIRVIEW DEVELOPMENT COMPANY, PROSECUTOR, v.
THOMAS FAY, COLLECTOR, ETC., RESPONDENT.

Submitted March 22, 1917—Decided June 6, 1917.

1. The fundamental rule, pervading all exemptions from the general tax burden of the state, is that they are not favored by the law unless the statute invoked to support them expresses the legislative intention in clear and unmistakable terms.
2. It is not reasonable to assume that the power conceded by the legislature to cemetery associations, for the purpose of the protection, under proper management, of the bodies of the dead, is so comprehensive in scope as to enable them to purchase tracts of land, and to hold them unimproved and undeveloped for any purpose out of the taxable assets of township, county and state assessments.
3. Where property, held by a cemetery association, presents no *indicia* of actual use or of reasonably contemplated use, within the statutory purview, such property should not be exempted from taxation.

4. Whether a company, formed under the General Corporation act for general business, may exercise the power and claim the privileges expressly conferred by exceptional legislation upon a distinctive species of corporation, created for the purpose of performing a *quasi*-public function, and existing specially for the purpose therein prescribed, *quære?*

Two writs of *certiorari*, removing assessments and taxes by the borough of Fairview, in the county of Bergen.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutors, *Weller & Lichtenstein*.

For the respondent, *Edwards & Smith*.

The opinion of the court was delivered by

MINTURN, J. Two cases, involving a claim of exemption from taxation are presented by these writs. In the first instance, the borough of Fairview, in Bergen county, levied a tax on the assessed value of the property of the Fairview Heights Cemetery Company, comprising about fifty acres, for the year 1913.

The prosecutor is organized under the Cemetery act (*Comp. Stat.*, p. 370) and owns and manages a cemetery comprising about sixty-five acres, fifty acres of which are not in use for cemetery purposes. The undeveloped section remains practically in its natural state. It was assessed and is taxed by the borough, from which assessment the prosecutor appealed to the county board, which board sustained the assessment and tax. The insistence of the prosecutor is that the entire tract in use and out of use is exempt from taxation.

The Cemetery acts have frequently been before this court, in various aspects of litigation, and from the views expressed as the result of those adjudications, the following principles may be gleaned: The fundamental rule pervading all exemptions from the general tax burdens of the state, is that they are not favored by the law, and will not be construed to exist unless the statute invoked to support them expresses

the legislative intention in clear and unmistakable terms. *Mausoleum Builders v. State Board, &c.*, 88 N. J. L. 592; *Cooper Hospital v. Camden*, 70 Id. 478; *Rosedale Cemetery Co. v. Linden*, 73 Id. 421.

In enacting legislation of this general character whose main and fundamental purpose is the protection under proper management of the bodies of the dead, it is not reasonable to assume that the power conceded by the legislature to cemetery associations, for that purpose, is so comprehensive in scope as to enable them to purchase tracts of territory and to hold them unimproved and undeveloped for any purpose, out of the taxable assets of township, county and state assessments.

If such a construction of this legislation were to be admitted, there would appear to be no limit to the bounds of the ownership of the corporation, within the terms prescribed in the act, except the financial carrying capacity of the corporation itself, and the following case involving a claim for exemption upon this ground will enable one to perceive how even that protective limitation may be evaded in actual practice.

The mere organization of a company, under the cemetery acts, and the purchase of land thereafter, without expenditure to improve or develop it, but the mere passive holding of the land, as it were by a species of mortmain, is not enough to bring the claim for exemption within the language and spirit of this legislation.

Ownership and use seem to be the legislative tests upon which an exemption from taxation of this character may legally be based. Section 4 of the Rural Cemetery act expressly provides that any portion of a cemetery "not actually set apart and used for burial purposes shall be subject to taxation," &c.

In 1883, this section was amended by a proviso reading that any portion of the property of any such company "not actually set apart and used for burial purposes shall be subject to taxation," &c. *Pamph. L.* 1883, p. 123.

The amendment of 1889 made no change in this feature of the legislation. *Pamph. L.* 1889, p. 418.

These various enactments are in *pari materia* and must be considered together as presenting a cohesive and consistent legislative scheme declaratory of a state policy of setting aside, by a separate species of tenure, through corporate agencies, sections of land, free from taxation, when such lands are actually in use, or within reasonable contemplation of being used for the purpose declared, in the statute. *Mt. Pleasant Cemetery v. Newark*, 89 N. J. L. 255; *Rosedale Cemetery v. Linden*, *supra*; *Mausoleum Builders v. State Board*, *ante* p. 163.

The *locus in quo* in this controversy presents no *indicia* of actual use or of reasonably contemplated use, within the statutory purview, which will enable us to bring it within such a classification, and the tax in question should therefore be affirmed.

The second writ removes an assessment and tax upon twenty-six acres of undeveloped land, situated on the Bergen turnpike and owned by the Fairview Development Company, a corporation not organized under the cemetery acts, but organized for business purposes under the General Corporation act.

It obtained title to the *locus in quo* in 1910, by a conveyance from the Fairview Cemetery Company, for one dollar and other valuable considerations; and thereafter an agreement was executed between the parties to the deed setting out the true consideration of the conveyance (\$360,000), and a covenant was entered into with the cemetery company that the latter company might sell burial plots from the land conveyed, upon certain prescribed terms, as to price and conditions. In effect, the instrument constitutes a holding agreement, by which the title to the *locus in quo* is vested in the development company, subject to certain uses; the covenant being in all formal essentials not unlike the common law covenant to stand seized to uses (4 *Kent Com.* 492); the purpose apparently being to vest in the development company, in trust, such lands as the cemetery company could not legally hold by reason of the limitation contained in the cemetery acts.

The land in question is part of forty acres lying west of the Bergen turnpike, and eleven acres of meadow land lying on the east side thereof. Nothing has been done to improve or develop this acreage, for cemetery uses, and it lies in its natural state, impressed with a cemetery use only, so far as the trust expressed in the agreement may impose that character of user upon it.

The situation thus presented in principle is not unlike that presented in the case of *Mt. Pleasant Cemetery v. Newark*, *supra*, and the recent case of *Mausoleum Builders, &c., v. State Board*, *supra*.

We do not deem it necessary to determine the power of a company, formed under the General Corporation act, for general business purposes, to exercise the power and claim the privileges expressly conferred by exceptional legislation upon a distinctive species of corporation, created for the purpose of performing a *quasi*-public function, and existing specially for the purpose therein prescribed, and for no other; nor do we deem it necessary to determine the further inquiry mooted in the briefs of counsel, whether in such a situation the lands in question can be properly considered as being held for cemetery uses, within the meaning and purview of the cemetery legislation.

It must suffice to declare, as we have done, in the previous instance, and for the reasons there advanced, that the *locus in quo* was not at the time of the imposition of this tax devoted to and in use for cemetery purposes, and for that reason this tax also must be affirmed.

N. Y., S. & W. R. R. Co. v. Pub. Utility Bd. 90 N. J. L.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY, PROSECUTOR, v. BOARD OF PUBLIC
UTILITY COMMISSIONERS AND CITY OF PATERSON,
RESPONDENTS.

Submitted March 22, 1917—Decided June 6, 1917.

1. A declaration, by the husband of the then owner of land, that if he opened streets through it the opening would conform to a certain map, lacks the essentials of a legal dedication—*first*, because it is not made by the owner of the *locus*, and *secondly*, because at most it is but a promise or agreement to dedicate *in futuro*.
2. The declared object of the Fielder Grade Crossing act (*Pamph. L. 1913, p. 91*) is to protect the public from danger incident to grade crossings. Consequently, where it appears that the danger incident to a proposed grade crossing can be obviated by a slight change in the line of streets, which can be made to practically serve the public use and convenience, the adoption of such a plan would seem to present a satisfactory substitute, and the permission granted by the Public Utility Commission for the construction of such grade crossing should be vacated.

On *certiorari* removing order of Public Utility Commissioners relative to grade crossing at Seventeenth avenue and Twenty-fourth street, Paterson.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *Collins & Corbin*.

For the commissioners, *L. Edward Herrmann*.

For the city of Paterson, *Randall B. Lewis*.

The opinion of the court was delivered by

MINTURN, J. The *certiorari* in this case removes an order made by the Board of Public Utility Commissioners, granting permission to the city of Paterson to construct a crossing at grade, over the railroad right of way at Seventeenth avenue

90 N. J. L. N. Y., S. & W. R. R. Co. v. Pub. Utility Bd.

and Twenty-fourth street, where the two streets come together. A crossing is arranged for Seventeenth avenue, but none is arranged for East Twenty-fourth street, and the proposal is to compel such construction by the railroad. The railroad contests the right of the city to require it on the ground that the street is not in fact a public highway. It was never laid out as such, and the city relies upon a map made in 1868 to evidence the dedication. We think the map does not show a dedication of the *locus in quo*. It contains a declaration by the husband of the then owner that if he ever opened the streets, the opening would conform to the map. This lacks the essentials of a legal dedication—*first*, because it is not made by the owner of the *locus*; and *secondly*, because at most it is but a promise or agreement to dedicate *in futuro*.

The buildings along the lines of the street, as actually used, and the actual practical use of the street as a dirt or cinder road, seem to be shown, and that fact would justify an inference that continued use has accorded to it the status of a public highway. That question, however, is not before us for decision, nor was it a subject for the determination of the Public Utility Commissioners, under the legislation prescribing their powers.

The fact is quite apparent that in opening up these two streets, as proposed, so that the railroad may cross them diagonally, a crossing involving serious danger to the public will be thereby created.

The commissioners seem to have dealt with the situation as though it presented a question of the construction of appurtenances to the railroad. The declared object of the statute is to protect the public from the danger incident to grade crossings, and the inquiry before the commissioners was whether such a crossing as that in question would result in increasing the danger and hazards of the public in the use of it; and if it would increase the public dangers, then whether in view of the situation thus presented, it was still necessary and desirable as a public crossing. For manifestly a public crossing at grade might be highly desirable as a pub-

Bradford v. DeLuca.

90 N. J. L.

lic convenience, but if its existence and continued use might serve in actual practice as a standing menace to the lives of the community, it would not comport with a proper exercise of wisdom, nor accord with the declared legislative policy and intent to authorize or compel such construction.

These important considerations seem not to have been discussed or determined by the board, and as we have intimated, they present the distinctive and vital inquiry in the case. We think it was made quite clear by the railroad, that the difficulty presented here could be obviated by a slight change in the lines of the streets at the corner where Seventeenth avenue and Twenty-fourth street intersect, and if such a change in existing conditions can be made to practically serve the public use and convenience, the adoption of such a plan would seem to present a satisfactory substitute, and a reasonable solution of the situation rather than a proposed construction which is menaced with the very difficulties and dangers which it is the avowed purpose of this legislation to eliminate.

We think the testimony before the board was not sufficient nor of a character to warrant or reasonably support the conclusion reached by the board, and for that reason we have concluded that the permission granted should be vacated. *Erie Railroad Co. v. Board of Utility Commissioners*, 89 N. J. L. 57; *Potter v. Board of Public Utility Commissioners*, *Id.* 157.

CHARLES L. BRADFORD, PROSECUTOR, v. FRANK DELUCA
AND FRANK KATOK, JUSTICES OF THE PEACE,
RESPONDENTS.

Submitted December 7, 1916—Decided June 12, 1917.

The act of 1846 (*Pamph. L.*, p. 181), entitled "An act for the preservation of clams and oysters," and the proceedings provided therein, has been superseded by the act entitled "An act to provide a uniform procedure for the enforcement of all laws relating to the

90 N. J. L.

Bradford v. DeLuca.

taking of natural seed oysters and clams and the protection of the natural seed oyster grounds of the state and for the recovery of penalties for the violation thereof" (*Pamph. L. 1900, p. 425*), which provides, among other things, that all proceedings for the recovery of penalties pursuant to the provisions of the act shall be entitled and run in the name of the State of New Jersey, with one of the oyster commissioners or their assistants or a police officer or a constable, and that "no proceedings shall be instituted by any person not a duly commissioned oyster commissioner or their assistants or a police officer or a constable of this state." *Held*, that a judgment rendered in a proceeding instituted by a private person under sections 7 and 9 of the act of 1846 must be set aside.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *William A. Logue* and *Walter H. Bacon*.

For the respondents, *Robert H. McCarter* and *William F. Kelly*.

The opinion of the court was delivered by

KALISCH, J. The prosecutor was the owner of a schooner equipped with tackle, apparel and furniture engaged in and used to rake and gather oysters in Maurice River cove and Delaware bay. He had for that purpose in his employ persons who were not residents of this state, the prosecutor being a citizen and resident of this state.

The present proceeding was instituted by one Zane, a private person, under sections 7 and 9 of an act entitled "An act for the preservation of clams and oysters." *Pamph. L. 1846, p. 181*. These sections provide that it shall be unlawful for any person who is not at the time an actual inhabitant and resident of this state and who has not been such inhabitant or resident for six months next preceding such time to rake or gather clams, oysters or shell-fish, either on his own account and benefit or that of his employer, in any of the rivers, bays or waters of this state, on board of any canoe, flat, scow, boat or other vessel under a penalty of

Bradford v. DeLuca.

90 N. J. L.

twenty dollars to be recovered and applied in the manner directed by the first section of the act, and the canoe, flat, scow, boat or other vessel, used and employed in the commission of such offence, with all the clams, oysters, clam rakes, tongs, tackle, furniture and apparel, shall be forfeited and seized, secured and disposed of in the manner prescribed in the ninth and tenth sections of the act; that it shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons to seize and secure any such canoe, flat, scow, boat or other vessel, and immediately thereon give information thereof to two justices of the peace of the county where such seizure shall have been made, who shall meet at such time and place as they shall appoint for trial thereof and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offence shall have been committed, and the other half to the person who shall have seized and prosecuted the same.

Section 3 of the act deals with proceedings to be instituted for penalties against individuals residing within or without the state who shall use or employ, or be on any boat, &c., where there is used or employed an instrument called a dredge in raking for or gathering oysters.

Zane undertook to seize the schooner by nailing to her mast a notice of her seizure, under the act of 1846 above referred to, and had her securely fastened to a float and immediately thereafter filed an information of such seizure before two justices of the peace, who set a time and place for a hearing.

The prosecutor appeared at the hearing, and after testimony taken the justices of the peace having found that the schooner had been used in the commission of the offence complained of, and in violation of section 7 of the act, ordered and adjudged "that the said schooner (C. L. Bradford) be and is hereby condemned, and that it be sold at public sale to the highest bidder * * * in the manner provided by section 9 of the act of 1846."

The principal question upon which the disposition of this case must turn is whether sections 7 and 9 of the act of 1846, under which this proceeding was had, are still in force, or whether they were supplanted by later legislation.

We think the legal procedure provided for in the act of 1846, for the enforcement of the various provisions thereof, has been superseded by later legislation.

Since 1846, many statutes have been passed for the preservation of clams and oysters. Various penalties were provided and different methods of procedure prescribed for their enforcement. Some of the statutes relate only to the oyster industry and prescribe penalties for their violation.

It is more than likely that in view of all this the legislature in order to bring about uniformity in the method of procedure against offenders under the various statutes, and to take the prosecution of the same out of the hands of private individuals, as under the act of 1846, and to put the entire matter under the control of public officials, enacted the statute entitled "An act to provide a uniform procedure for the enforcement of all laws relating to the taking of natural seed oysters and clams and the protection of the natural seed oyster grounds of this state and for the recovery of penalties for the violation thereof." *Pamph. L.* 1900, *p.* 425.

Section 1 of the act provides that all laws, general and special, for the protection of natural seed oysters grounds, or in any manner prohibiting or regulating the taking of possession of natural seed oysters and clams, shall hereafter be enforced, and all penalties for violation thereof shall hereafter be recovered in accordance with the provisions of the act.

Section 2 confers jurisdiction on justices of the peace, District Courts and police magistrates to deal with offenders for offences committed against any of the provisions of the various statutes.

Section 3 points out the method of procedure, and, among other things, it is to be observed that where the proceeding is in the justice's court it is before a justice of the peace sitting alone.

DuPont De Nemours Co. v. Spocidio.

90 N. J. L.

The thirteenth section of the act provides that all proceedings for the recovery of penalties, pursuant to the provisions of the act, shall be entitled and shall run in the name of the State of New Jersey, with one of the oyster commissioners or their assistants or a police officer or a constable; and here follows significant language: "And no proceedings shall be instituted by any person not a duly commissioned oyster commissioner or their assistants or a police officer or a constable of this state."

Section 15 repeals all acts and parts of acts inconsistent with the provisions of the act.

The procedure provided for by the statute of 1900, therefore, supplants that of 1846.

Having reached this result it becomes unnecessary to consider the other reasons presented and argued for setting aside the proceedings.

The judgment will be reversed, with costs.

E. I. DUPONT DE NEMOURS POWDER COMPANY, PROSECUTOR, v. JAMES SPOCIDIO, RESPONDENT.

Submitted December 7, 1916—Decided June 28, 1917.

1. Whether, in a proceeding under the Workmen's Compensation act there was a prior agreement between the parties to make compensation, under the statute, without resorting to the Court of Common Pleas by petition, is a mixed question of law and fact; and where there was testimony to the effect that the employer agreed to and did pay the petitioner periodically one-half of his weekly wages for some time after the accident, and also medical expenses incurred as a result of the petitioner's injuries, the trial judge was justified in finding that there was such an agreement.
2. An agreement, made within a year after an accident, between any employer and employe, for compensation due under the Workmen's Compensation act, for a less sum than that which may be determined by the judge of the Court of Common Pleas to be due, is a sufficient agreement under the act to relieve the petitioner of the duty of bringing his action within one year or otherwise be barred of his action.

90 N. J. L.DuPont De Nemours Co. v. Spocidio.

On certiorari.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutor, *J. Forman Sinnickson.*

For the respondent, *Bergen & Richman.*

The opinion of the court was delivered by

KALISCH, J. The question to be determined upon this review is whether the respondent, the petitioner in the court below, filed his petition for compensation under the Workmen's Compensation act within the time required by law.

The petitioner was in the employ of the prosecutor. On the 25th day of January, 1915, the petitioner, while engaged in transporting cans of cotton from one part of the respondent's plant to another, fell and broke his left arm in three places and suffered a permanent injury.

On the 3d of March, 1916, the petitioner filed his petition for compensation. On the 24th of March, 1916, the petitioner by leave of the court filed an amended petition. In this latter petition he sets forth that after the accident mentioned, he and the prosecutor agreed upon the amount of compensation due to the petitioner for his injuries; that petitioner was informed that he would receive one-half of his wages until he was able to return to work, and after the expiration of fifteen days from the date of the accident, the prosecutor paid the petitioner \$5.28 per week, being fifty per cent. of his weekly wages, and which sum it paid him weekly until the 5th day of April, 1915, when he was told by the prosecutor's physician to return to work, but that the petitioner was not physically able to return to work at the time, not being entirely cured of his injuries and suffering from a permanent disability as a result of his injuries.

The petition further sets forth that the prosecutor paid petitioner's medical expenses, including an operation performed on petitioner's arm; that the petitioner is not entirely cured of his injuries and is suffering from a permanent dis-

ability of his left arm; that he has not been fully compensated under the statute for his injuries received from the accident, and that the agreement as to the compensation made between him and the prosecutor had not been approved of by the judge of the court in which the petition is filed, or a judge of any other Court of Common Pleas in any county of this state; and that a dispute has arisen between the prosecutor and petitioner as to the compensation due the latter.

The fact that the petitioner's injuries were due to an accident arising out of and in the course of his employment is not disputed by the prosecutor.

The trial judge found that as a result of the accident the petitioner broke his left arm in three places, and that as a result thereof the petitioner suffered a temporary injury to his arm extending from the time he was injured (January 25th, 1915) until the 5th day of July, 1915, and that there is a permanent injury to the whole arm of ten per cent.; that after the petitioner was injured he was first taken to the office of Dr. Lummis, and was there treated, and subsequently to the Cooper hospital in Camden; that the petitioner was told to go to the plant of the prosecutor and he would be paid one-half of his wages; that petitioner went to the prosecutor's plant and received the sum of \$5.28 per week from the prosecutor until the 7th day of April, 1915, a total of \$42.24; that the petitioner was then given a note by Dr. Lummis advising him to go to the plant for work, the doctor stating that he would be able to do light but not heavy work; that the petitioner returned to the plant and did work from the 13th day of April, 1915, until the 13th day of May, 1915, when he was discharged from the plant and has not been at work there since.

From these facts the trial judge further finds that there was an agreement and money actually paid to the petitioner under the agreement to the amount as above stated from the time of the petitioner's injury. The trial judge further made the following findings:

"That the prosecutor is entitled to a credit on the amount awarded of \$5.28 a week for a period of eight weeks, or a

total credit of \$42.24; that the prosecutor is not entitled to a credit of \$43.25 paid for medical expenses after the first two weeks, nor what was paid to the petitioner for the time he worked from April 16th, 1915, to May 13th, 1915, since there was no proof of any agreement that it should be payment under the act; that the petitioner is entitled to compensation at the rate of \$6.12 per week for twenty-one weeks from the 8th day of February, 1915 (being two weeks after the accident happened), for the temporary injury to his arm, and that subsequent thereto the petitioner is entitled to the sum of \$6.12 per week for a period of twenty weeks for the permanent injury to his arm."

The prosecutor seeks a reversal of the judgment on two grounds:

1. That the proceeding is barred by the statute of limitations.
2. That "the Court of Common Pleas did not find and determine the facts from which the legality of the award by said court can be determined."

Taking up for consideration the second point made by the prosecutor first, we think that by the facts above set forth, it sufficiently appears what the injuries to the petitioner were—their nature and extent.

As to the position taken by the prosecutor that the proceeding of the petitioner is barred by the statute, which provides that in case of personal injuries or death all claims for compensation on account thereof shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under the act, or unless within one year after the accident one of the parties shall have filed a petition for adjudication of compensation as provided by the act (*Pamph. L.* 1913, p. 302), because the petition in the present case was filed after a year had elapsed from the time of the accident, we find to be untenable.

It is plain that the statute provides three methods which may be pursued within the year, for the purpose of fixing compensation to be paid to an injured employee—(1) by a petition filed by the injured workman, (2) by a petition filed

DuPont De Nemours Co. v. Spocidio.

90 N. J. L.

by the employer of the injured workman, and (3) by an agreement between employer and employe.

In the present case there was testimony which afforded a reasonable basis for the finding of the trial judge that there was an agreement for compensation to be paid petitioner between the prosecutor and petitioner, under the statute. For there was testimony to the effect that the prosecutor, after the lapse of two weeks from the time of the accident, agreed to and did pay to the petitioner periodically one-half of the petitioner's weekly wages for some time, until the prosecutor requested the petitioner to go to work, which the petitioner did, but was soon afterward discharged. It also appears that the prosecutor paid the medical expenses, amounting to \$43, incurred as a result of the petitioner's injuries.

Whether there was an agreement between the parties to make compensation, under the statute, without resorting to the Court of Common Pleas by petition, was a mixed question of law and fact, and we think there was evidence justifying the finding of the trial judge that there was such an agreement.

It is clear from the plain reading of the statute that where the parties agree as to the compensation to be made, the legislature contemplated that such agreement should be wholly regulated and controlled by the provisions of the statute, both as to the duration of time and the amount of compensation to be periodically paid.

Paragraph 20 of the Workmen's Compensation act (*Pamph. L. 1913, p. 309*) expressly provides, *inter alia*, that no agreement between the parties for a lesser sum than that which may be determined by the judge of the Court of Common Pleas to be due, shall operate as a bar to the determination of a controversy upon its merits, or to the award of a larger sum, where it shall be determined by the judge that the amount agreed upon is less than the injured employe or his dependents are properly entitled to receive.

In the present case it appears that the petitioner was earning \$12.24 per week at the time of the accident, and, therefore, the petitioner was entitled to receive \$6.12 per week

instead of the periodic weekly payment of \$5.28, as agreed upon between the parties. It further appears that under the statute the petitioner was entitled to compensation for temporary injuries for the period of twenty-one weeks and for permanent injuries for twenty weeks, and that all the prosecutor paid to the petitioner under the agreement were periodical payments of \$5.28 for eight weeks. Thus it becomes manifest, in view of the excerpt from paragraph 20, above quoted, that the petitioner was not barred from filing a petition in order to have the agreement made between the parties reviewed by the court upon its merits at any time.

As it appears in the present case that there was an agreement made between the prosecutor and the petitioner as to the compensation to be paid by the former to the latter, the one-year limitation clause in which a petition must be filed or an agreement made for compensation is obviously not applicable to the situation presented here. And this is also equally true as to the non-applicability of the clause of paragraph 21 of the act of 1913, which provides that an agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative, on the ground that the incapacity of the injured has subsequently increased or diminished, because the petition under consideration is not filed on either ground. But if we turn to paragraph 18 of the act, we find that provision is made by it for filing a petition in case of a dispute or failure to agree upon a claim for compensation between employer and employe, &c., and that either party may submit the claim, both as to questions of fact, &c. Paragraph 20 points out in general terms what the petition shall set forth in case of a dispute.

We cannot be led to believe that it was the purpose of the legislature to put agreements entered into within the year between employer and employe, as to the compensation to be paid, upon a less secure footing than an award made upon a petition filed within the year. One of the objects of the act is to secure to the parties an inexpensive method of procedure. Of course, an agreement between employer and em-

Hansen v. Brann & Stewart Co.

90 N. J. L.

ploye involves no expense whatever and saves to the employer the expense of a hearing, &c. If in the present case either party had filed a petition within the year, and the court had made an award of compensation, there could not be the slightest doubt under the express language of the statute, that either party would have the right in case a dispute arose regarding the compensation, &c., to file a petition after the expiration of the year. The statute has put the agreement between employer and employe on the same plane as an award made by the court upon petition, after a hearing, &c. And this course was manifestly necessary, in order to prevent one of the prime objects of the act from being frustrated.

For it is obvious that if the argument made by counsel for the prosecutor should prevail, then in a case where an employe is entitled to compensation for a period extending beyond fifty-two weeks, and enters into an agreement with his employer, as he may under the statute, then if at the end of the year, after the last payment due for the year has been paid, the employer should choose to discontinue any further payments, the employe would be remediless under the statute. We cannot give our sanction to such a construction without violating the plain language and spirit of the act and extinguishing one of its vital features.

The judgment will be affirmed, with costs.

ELLEN OLSEN HANSEN, ADMINISTRATRIX OF ALF OLSEN,
DECEASED, PROSECUTRIX, v. THE BRANN & STEWART
COMPANY, RESPONDENT.

Submitted December 7, 1916—Decided June 7, 1917.

1. The amendment of 1913 (*Pamph. L.*, p. 302), amending paragraph 12 of the Workmen's Compensation act of 1911 (*Pamph. L.*, p. 134), provides that if the widow of a deceased employe remarry during the period covered by weekly payments, the right of the widow "under this section shall cease." *Held*, that a widow,

90 N. J. L.

Hansen v. Brann & Stewart Co.

whose husband was killed prior to the passage of the amendment of 1913, leaving her as his sole dependent, acquired a vested right to compensation during three hundred weeks, which could not be legally abridged by subsequent legislation, and did not, by her subsequent remarriage, forfeit her right to recover compensation payments for the full period fixed by the statute.

2. Though a widow remarried, she did not thereby cease to be the widow of the deceased husband.

On *certiorari*.

Before Justices SWAYZE, MINTURN and KALISCH.

For the prosecutrix, *Pierson & Schroeder*.

For the respondent, *Lindabury, Depue & Faulks* (John W. Bishop, Jr., and Kinsley Twining on the brief).

The opinion of the court was delivered by

KALISCH, J. The facts in this case present the single question whether under the Workmen's Compensation act of 1911 a widow, whose husband was killed prior to the passage of the amendment of 1913, amending paragraph 12 of the act of 1911, leaving her as his sole dependent, forfeits her right to receive compensation payments for the full period fixed by the statute by a remarriage.

The amendment of 1913 referred to provides that if the widow of a deceased employe remarry during the period covered by weekly payments the right of the widow "under this section shall cease."

The principal facts found by the trial judge are succinctly stated, in his opinion, as follows: "Alf Olsen, on the 27th day of September, 1911, while in the employment of the respondent, received injuries by an accident arising out of and in the course of his employment which resulted in his death a few days later. At the time of the accident he was in receipt of wages at the rate of \$21 a week. He left no dependent surviving him except his widow, the petitioner herein, to whom letters testamentary were issued. The respondent, admitting its liability, made payments to her as a

Hansen v. Brann & Stewart Co.90 N. J. L.

dependent under the Workmen's Compensation act, at the rate of \$5.25 a week up to November 11th, 1914. On November 25th, 1914, the petitioner was married to her present husband, Harold Hansen, with whom she is now living, and by whom she is now supported."

After remarriage, respondent refused to continue the weekly payments, disputing the right of the petitioner thereto because of her remarriage. Thereupon the petitioner filed her petition in the Court of Common Pleas, in order to have that tribunal settle the dispute between them. The respondent, in its answer to the petition, admitted its liability to make compensation under the statute, but claimed that its liability ceased upon the petitioner's remarriage. By the act of 1911 the compensation in case of death shall be paid during three hundred weeks.

It also appeared that the respondent paid the petitioner the fixed weekly compensation for one hundred and thirty-nine weeks, leaving one hundred and sixty-one weeks to be compensated for under the statutory schedule. The trial judge found that the petitioner was not entitled to recover compensation for any period of time after the date of her remarriage, and that her right to compensation ceased upon such remarriage.

In reaching this conclusion the trial judge erred. This case must be dealt with under the provisions of the act of 1911. If, under that act, the petitioner, upon the death of her husband, was entitled to compensation during three hundred weeks, she acquired a vested right, which could not be legally abridged by subsequent legislation. The amendment of 1913, therefore, which cuts off the widow's right to compensation, upon remarriage during the period covered by weekly payments, can have no bearing upon the construction to be given to the act of 1911, except as evidencing a change of the legislative mind, in respect to what shall happen to an award of compensation made after the passage of the amendment to a widow who subsequently remarried and pending the period of weeks for which compensation was to run.

It is obvious, from a plain reading of the act of 1911, that

90 N. J. L.

Hansen v. Brann & Stewart Co.

the legislature provides for an award of compensation to a widow without any condition annexed. Therefore, in order to give the construction contended for by counsel for respondent, we would be forced to read into this act the condition contained in the amendment of 1913, which, as has been already pointed out, is clearly not permissible.

It is a matter of pertinent significance to the topic in hand to observe that where the legislature intended to subject an original award to a change by the court during the period of weeks for which it was to run, it expressly provided for such contingency; and it is strikingly noticeable that the authority to make a change in the award is limited, firstly, as to time—that is, after one year when the award became operative, and secondly, to cases of living injured employes, and then only “on the ground that the incapacity of the injured employe has subsequently increased or diminished.” *Pamph. L. 1911, p. 143, second clause of paragraph 21.*

If we seek further for the intention of the legislature, whether or not it was its design that the widow should have a vested interest in the award at the time it is made, we readily find it expressed that she should have such vested interest in section 2, paragraph 21, page 143 of the act of 1911, which paragraph authorizes the trial judge to commute the “amounts payable periodically” to one or more lump sums.

As to the insistence of counsel for respondent that since the act provides that the weekly payments shall be made to the widow, therefore, when the petitioner remarried she ceased to be widow, under the statute, to whom the payments should be made, we think is without merit.

In *Clay v. Edwards*, 84 N. J. L. 221, this court held that the phrase “husband of a daughter,” in a statute exempting from inheritance taxation property passing to the husband of a daughter, includes within its meaning the surviving husband of a deceased daughter, even though he subsequently remarried.

So, in the present case, the legal status of the widow, upon marriage, did not change so as to affect any vested rights she had acquired before her remarriage.

Dept. of Health of N. J. v. Monheit.90 N. J. L.

And, moreover, in the general sense of mankind, and in the legal sense, though the widow remarried, she did not cease thereby to be the widow of the deceased husband.

The views herein expressed bring us to the conclusion that the widow is entitled to have the weekly payments paid her for the entire period of three hundred weeks, and that the judgment of the court below should be reversed and the record remitted, to the end that it may be proceeded upon according to law. The prosecutrix is entitled to costs.

DEPARTMENT OF HEALTH OF THE STATE OF NEW JERSEY, RESPONDENT, v. HIRSCH MONHEIT, PROSECUTOR.

Argued June 6, 1917—Decided June 19, 1917.

In an action to recover a penalty for violating the provisions of the Pure Food law (*Pamph. L. 1915, p. 665, § 1*) commenced in the small cause court, the Court of Common Pleas of the county in which the action is brought has jurisdiction to hear the case on appeal.

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the respondent, *Josiah Stryker* and *John W. Wescott*, attorney-general.

For the prosecutor, *Alvord & Tusso*.

The opinion of the court was delivered by

BLACK, J. The question to be decided in this case is the jurisdiction of the Common Pleas Court to hear a case on appeal, in a suit brought in the small cause court, before a justice of the peace, to recover a penalty for a violation of the pure food statute. The defendant was charged with the vio-

lation of section 1 of the supplement (*Pamph. L. 1915, p. 665*) to the Pure Food act. *Rev., Pamph. L. 1907, p. 485*. He was found not guilty by a jury in the small cause court. The department of health appealed from the decision to the Court of Common Pleas, in the county of Cumberland. That court found the defendant guilty and imposed a penalty of fifty. (\$50) dollars, hence a writ of *certiorari* was allowed, which draws in question the jurisdiction of the Court of Common Pleas. The grounds of attack are, that the suit should have been commenced before the justice of the peace, sitting as a magistrate, and that, by the original Pure Food act (*Pamph. L. 1901, p. 186, § 16*), parties aggrieved may appeal to the Circuit Court of the county, wherein said action is had. Manifestly, this view of the prosecutor is untenable, as is clearly demonstrated by the following provisions in the statute law of the state. Thus, the Revised Pure Food act, above cited (*Pamph. L. 1907, p. 485, § 40; Comp. Stat., p. 2574, § 40*), provides "any and all penalties prescribed by any of the provisions of this act shall be recovered in an action of debt. * * * The pleadings shall conform, in all respects, to the practice prevailing in the court in which any such action shall be instituted." And in the supplement above cited (*Pamph. L. 1915, p. 665, § 5*), the statute under which the action in this case was brought, it is provided: "Such penalties may be sued for and recovered by the same boards and officials, and in the same manner, as provided for the recovery of penalties in the act to which this act is a supplement." The act speaks of a court, the only court, which a justice of the peace is empowered to hold is the small cause court; by the Small Cause Court act (*Pamph. L. 1903, p. 251, § 80, as amended Pamph. L. 1904, p. 72, § 80*) it is further provided that from any judgment which may be obtained in those courts, except such as may be given by confession, an appeal is given to the Court of Common Pleas of the county.

The case of *Harman v. Board of Pharmacy*, 67 N. J. L. 117, however, is decisive of this case; there the prosecutor was convicted of violating the Pharmacy act; the suit was to

Flynn v. N. Y., S. & W. R. R. Co.90 N. J. L.

recover a penalty under the act; as in this case, the same point was there made that the suit should have been commenced before a justice of the peace sitting as a magistrate and not in the small cause court; that case held the action was properly commenced in the small cause court.

We therefore conclude that the Court of Common Pleas had jurisdiction to hear the case on appeal. The judgment of that court was regular. The rules applying to summary convictions have no application; it is not necessary that the evidence in the court be set out or the procedure conform to the rules governing summary convictions.

The judgment of the Common Pleas Court of Cumberland county is affirmed, with costs.

MARY FLYNN, RESPONDENT, v. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, PROSECUTOR.

Submitted June 6, 1917—Decided September 14, 1917.

1. A crossing flagman, employed by a railroad company engaged in interstate and intrastate commerce, was struck and killed by the engine of a train engaged in interstate commerce. *Held*, that the Court of Common Pleas of New Jersey is ousted of jurisdiction to award compensation under the New Jersey Workmen's Compensation act. The Federal Employers' Liability act is exclusive.
2. Although the findings of the Court of Common Pleas as to the facts in workmen's compensation cases are conclusive on appeal, nevertheless the law arising upon undisputed facts is a question of law for the court reviewing the decision to decide.

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Collins & Corbin*.

For the respondent, *Edward F. Merrey*.

90 N. J. L.

Flynn v. N. Y., S. & W. R. R. Co.

The opinion of the court was delivered by

BLACK, J. The writ of *certiorari* in this case is to review a determination of the Court of Common Pleas of Passaic county, in a proceeding under the New Jersey Workmen's Compensation act, brought by Mary Flynn, the widow of James Flynn, deceased.

The trial court determined that the petitioner is entitled to five (\$5) dollars per week for a period of three hundred weeks, beginning on the 30th day of April, 1916. The trial court further found the prosecutor is a common carrier and is engaged both in interstate and intrastate commerce, that James Flynn was not employed by the prosecutor in interstate commerce, and thereupon the Federal Employers' Liability act does not apply. It is to review this latter finding that the controversy is brought under review in this court.

The pertinent facts are: The deceased, James Flynn, on March 23d, 1916, was employed by the prosecutor as a crossing flagman at the Lyon street crossing in the city of Paterson; while thus engaged in the performance of his duties as a flagman, with respect to a passing train, which was carrying passengers and baggage from points in the State of New York to various points in the State of New Jersey, he was struck and killed by the engine of the train in the course of his employment. Flynn crossed over the eastbound tracks of the prosecutor, on the approach of an eastbound train, to flag the crossing, and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breastpiece of an engine drawing a train on the westbound tracks, which was an interstate train. The question therefore for solution, and the only one, is, was the deceased at the time of his death engaged in an interstate act? If so, it is firmly settled by the recent decisions of our Court of Errors and Appeals, in the case of *Rounsaville v. Central Railroad Co.*, ante p. 176, and by the United States Supreme Court, in the case of *Erie Railroad Co. v. Winfield* (decided May 21st, 1917), 244 U. S. 170, reversing 88 N. J. L. 619, that the Federal Employers' Liability act of 1908 is ex-

Flynn v. N. Y., S. & W. R. R. Co.

90 N. J. L.

clusive of the state act and ousts the Courts of Common Pleas of the state of jurisdiction under the New Jersey Workmen's Compensation act.

The courts, thus far, apparently have been unable to formulate any rule, sufficiently exact, comprehensive and exclusive, by which to test the quality of an act or series of acts as falling within, or without, the domain of interstate business. Upon reflection, it would seem almost impossible to formulate a rule applicable to the almost endless variety of circumstances and facts springing out of the intricacies of everyday modern life, that will be of much practical use or aid. The application of the principle must be made to particular facts, as they arise, and by a process of exclusion and inclusion a rule may perhaps be formulated in time from the decision of such cases. There is already a long line of cases, in the federal and state courts, showing the application of the principle to the facts under discussion. It would serve no useful purpose to collate or cite these decisions. The decisions in the United States Supreme Court, the ultimate authority on the point, are quite uniform when stating the principle to use such language as this—the employe must be engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereto. *New York, &c., Railroad Co. v. Carr*, 238 U. S. 260; or in work so closely related to it (i. e., interstate transportation) as to be practically a part of it. *Shanks v. Delaware, &c., Railroad Co.*, 239 Id. 556; so, *Louisville, &c., Railroad Co. v. Parker*, 242 Id. 13.

We have been unable to find any case in the federal courts where this precise question has been passed upon. We are referred to two cases, however, in the California Supreme Court, both of which held that crossing flagmen engaged in flagging, on a railroad where interstate trains were being operated, were engaged in interstate commerce. *Southern Pacific Co. v. Industrial Accident Commission (Cal.)*, 161 Pac. Rep. 1139; *Southern Pacific Co. v. Industrial Accident Commission*, Id. 1142. These cases, of course, are not binding precedents upon this court, but we think

90 N. J. L.

Flynn v. N. Y., S. & W. R. R. Co.

these decisions are in harmony and accord with the spirit and principle of the cases decided by the Supreme Court of the United States. Notwithstanding this situation, it is now urged by the defendant that the statute makes the judgment of the Court of Common Pleas conclusive and binding as to all questions of fact. *Pamph. L.* 1911, p. 134, § 18; *Nevich v. Delaware, &c., Railroad Co.*, ante p. 228; *Hulley v. Moosbrugger*, 88 N. J. L. 161. The judgment of the Common Pleas must be upheld if there is any evidence in the case to support it. This, of course, must be accepted as the law of the state, but in the case of *Hulley v. Moosbrugger*, *supra*, it was said by Chancellor Walker, speaking for the Court of Errors and Appeals, "Although the findings of the Court of Common Pleas as to the facts of the case are conclusive, according to section 18 of the act, and the decision of the Supreme Court * * * and, therefore, are conclusive here, yet, nevertheless, the law arising upon ascertained facts is a question for the court reviewing the decision."

The finding of the trial judge that the deceased, James Flynn, was not employed by the prosecutor in interstate commerce is not a finding of fact, it is a statement of law; the facts in the case are entirely undisputed; it is a pure question of law arising upon facts that are not disputed. We think James Flynn at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business, as substantially to form a part or a necessary incident thereto, and under the decision of the Supreme Court of the United States, in the *Winfield Case*, *supra*, that fact ousted the Common Pleas Court of Passaic county of jurisdiction.

The judgment, therefore, of the Passaic Court of Common Pleas is reversed, with costs.

Jersey City v. Borst.

90 N. J. L.

MAYOR, ETC., OF JERSEY CITY, PROSECUTOR, v. KATHARINE LOVELL BORST, AS NEXT FRIEND, RESPONDENT.

Submitted June 6, 1917—Decided September 14, 1917.

1. The supplement to the Workmen's Compensation act (*Pamph. L. 1913, p. 230*), which provides "that no person (i. e., employe of the state, county or municipality) receiving a salary greater than \$1,200 per year" shall be compensated, under section 2 of the original act (*Pamph. L. 1911, p. 134*), applies only to employes of the class therein mentioned who were injured. It does not apply to cases of death where dependents of employes are affected.
2. The Workmen's Compensation statute is a remedial law of prime import; it should be liberally and broadly construed.

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *John Bentley*.

For the respondent, *Richard F. Jones*.

The opinion of the court was delivered by

BLACK, J. This is a workmen's compensation case. The *certiorari* was allowed to review the determination of Judge George G. Tennant, in the Hudson County Common Pleas. An award of \$10 per week for three hundred weeks was made, in that court, from May 3d, 1914. The facts are not disputed. The point on review and for decision is a pure question of law, involving the correct construction of the supplement, approved March 27th, 1913 (*Pamph L., p. 230*), to the Workmen's Compensation act, which was approved April 4th, 1911. *Pamph. L., p. 134*. The first section of that act provides "every employee who shall be in the employ of the state, county, municipality * * * shall be compensated under and by virtue of section 2 to which this act is a supplement; *provided, however*, that no person receiving a salary greater than twelve hundred dollars per year, nor any person holding

90 N. J. L.

Jersey City v. Borst.

an elective office shall be entitled to compensation;" section 2: "when any payment shall be due under the provisions of this supplement or the act to which it is a supplement, the name of the injured employee, or in case of his death, the names of the persons to whom payment is to be made as his dependents shall be carried on the pay roll," &c.

It is conceded that the respondent would be entitled to compensation were it not for the proviso in the above supplement. The facts, in brief, are: W. Hudson Lovell, the deceased, was an employe of the mayor and aldermen of Jersey City as an assistant fire chief, or assistant engineer, in the fire department. On May 3d, 1914, while responding to a fire call or alarm he was killed in a collision; he was receiving pay at the rate of two thousand eight hundred and fifty (\$2,850) dollars per year. He left him surviving an actual dependent, Helen Katharine Borst, a granddaughter. We think the judgment of the Court of Common Pleas is founded upon the correct construction of the statute and therefore must be affirmed. The reasoning that carries the mind forward to this conclusion may be briefly indicated as follows:

The original Workmen's Compensation act (*Pamph. L. 1911, p. 134*) applies to municipal corporations and their employes. *Allen v. City of Millville*, 87 N. J. L. 356; *affirmed*, 88 *Id.* 693. Paragraph 19 of the original act (*Pamph. L. 1911, p. 142*) provides for the payment of compensation in cases of death. It is significant, if not important, that the title of the supplement, *supra*, *Pamph. L. 1913, p. 230*, is identical in terms with the title of the original act, except "a further supplement to an act entitled;" as stated, it is a supplement to the original act; now the ordinary meaning of the word "supplement" doubtless is a supplying by addition of what is wanting. *Rahway Savings Institution v. Mayor, &c., of Rahway*, 53 *Id.* 48. It is a fair argument to say that the supplement applies *only* to employes of the class therein mentioned who are injured. It does not apply to cases of death, where dependents of employes are affected; this would seem to be clear in view of section 2, *supra*, which provides that the

name of the injured employe, "in case of his death, the names of the persons to whom payment is to be made as his dependents, shall be carried upon the pay roll." This construction is not inconsistent but in harmony with section 1 of the 1913, page 230, supplement, *supra*.

A reason for this, if it is the true interpretation of the legislative will, may, perhaps, be found in the fact, that an injured employe of a municipal corporation usually receives his full wages, from the municipality, while incapacitated from personal injuries. It limits the application of section 11 of the original act of 1911, page 134; so that, no injured employe himself, who receives "a salary greater than twelve hundred dollars per year," should be entitled to secure compensation for personal injuries.

In other words, section 1 of the supplement, *supra* (*Pamph. L. 1913, p. 230*), deals with a designated class of injured employes, but leaves untouched the provisions of the act relating to dependents, when death ensues. What was so aptly said by Judge Vredenburg, speaking for the Court of Errors and Appeals, in the case of *Beagle v. Lehigh, &c., Coal Co.*, 82 N. J. L. 707, 710, applies to the construction of the workmen's compensation statute. This law, it will be noted by a reference to its terms, is a remedial law of prime import, and should be liberally construed. It should be broadly construed. To a like effect is the case in the Supreme Court of Errors of Connecticut. *Powers v. Hotel Bond Co.*, 89 Conn. 143; 93 Atl. Rep. 247.

The judgment of the Hudson County Court of Common Pleas is affirmed, with costs.

90 N. J. L.

Materka v. Erie R. R. Co.

MARY MATERKA, ADMINISTRATRIX, ETC., RESPONDENT,
v. ERIE RAILROAD COMPANY, APPELLANT.

Submitted November 9, 1916—Decided June 6, 1917.

1. It is for the jury to say what weight shall be given to the testimony of a witness, having an opportunity to hear, standing at or near the crossing where the accident occurred, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, in a grade crossing accident case.
2. It was not error in this case to refuse to direct a verdict in favor of the defendant on the ground that there was no proof of negligence on the part of the defendant, or because the decedent was guilty of contributory negligence. They were both jury questions. *Holmes v. Pennsylvania Railroad Co.*, 74 N. J. L. 469; *Weiss v. Central Railroad Co.*, 76 Id. 348; *Howe v. Northern Railroad Co.*, 78 Id. 683, distinguished.

On appeal from the Hudson Circuit Court.

Before Justices TRENCHARD and BLACK.

For the appellant, *Collins & Corbin* and *George S. Hobart*.

For the respondent, *Alexander Simpson*.

The opinion of the court was delivered by

BLACK, J. This action was brought by the plaintiff, as administratrix of Ferdinand Materka, to recover damages for the benefit of his widow and next of kin, by reason of his death, on September 6th, 1912, by being struck by an east-bound express train, at the Park avenue grade crossing, in the borough of East Rutherford and Rutherford, Bergen county, while he was crossing the tracks on foot; at that crossing there were four tracks, safety gates and a watchman. A rule to show cause was allowed, reserving objections and exceptions noted at the trial. The verdict was reduced to the sum of four thousand (\$4,000) dollars. The trial court refused to

set aside the verdict on the ground that it was against the weight of evidence. The points argued by the appellant for a reversal of the judgment are, first, there was no proof of negligence on the part of the defendant; second, a verdict should have been directed for the defendant because of contributory negligence of the decedent, Ferdinand Materka; third, error in the charge of the trial judge, and in the refusal to charge as requested, but this latter point involves the same points as are in the first two, except as hereinafter noted. This is the second trial of the case. The judgment recovered in the first trial was reversed by the Supreme Court for trial errors. The judgment of the Supreme Court was affirmed by the Court of Errors and Appeals. In the report of the case the facts are quite fully and satisfactorily stated. *Materka v. Erie Railroad Co.*, 88 N. J. L. 372.

The crux of the case is whether there was evidence, from which the jury might find, that the decedent attempted to make the crossing, while the safety gates were up and without receiving any warning from the flagman, that the train, which struck the decedent, approached the crossing without giving the statutory signals, of ringing a bell or sounding a steam whistle.

The record shows the following testimony:

David Harris, a witness, testified.

"Q. Were the gates up when you crossed over?

"A. Yes. * * * I crossed into East Rutherford and I saw this gentleman get off this trolley car and cross the railroad tracks.

"Q. Were the gates up when he crossed?

"A. The gates were up on one, yes.

"Q. On your side?

"A. The side I crossed the gate was up on, yes.

"Q. That is the side he entered the tracks from?

"A. That is the side he entered the tracks on.

"Q. When he came from the trolley car and went on the tracks the gates were up, I understand?

"A. That is right, sir.

90 N. J. L.Materka v. Erie R. R. Co.

"Q. After he got on the tracks what occurred?"

"A. Why; that gate on the Rutherford side went down.

"Q. Yes.

"A. And the gate on the East Rutherford side was up.

"Q. Yes.

"A. And I passed a remark.

"Q. You cannot tell what you said—just what you saw; you saw this?

"A. I saw this man cross the track and there was a train coming down the track, and I said to myself, I don't think he will get across, and with that I saw the man hit. * * *

"Q. Did you hear any whistle or bell up to the time you saw him hit?

"A. I did not, sir."

On cross-examination.

"Q. You did not know it was coming?

"A. No, sir.

"Q. You were not listening for it?

"A. No, sir.

"Q. Not paying any attention to it at all?

"A. No, sir.

"Q. I understand you to say, however, that you did see it coming; is that right, you did see the train coming before it struck Mr. Materka?

"A. Yes."

[Witness marks on a photograph, *Ex. P-5*, where he was standing at that time.]

Re-direct.

"Q. Now, Mr. Hobart asked you if you were listening for the express train; you did not know it was coming until you saw it, did you?

"A. No, sir.

"Q. And from the time you started across the crossing up to and until the time you saw the express train, had you heard any whistle or bell of any kind?

"A. No, sir."

Genevieve Ruth Saxly, a witness standing at the crossing at the time of the accident, did not hear any whistle before

the decedent was struck; she said she was not listening for whistles.

Under the rule laid down in the cases, in the Court of Errors and Appeals of this state, such as *Danskin v. Pennsylvania Railroad Co.*, 83 N. J. L. 522, 526; *Horandt v. Central Railroad Co.*, 81 Id. 488; *Waible v. West Jersey, &c., Railroad Co.*, 87 Id. 573; *McLean v. Erie Railroad Co.*, 69 Id. 57, 60; *affirmed*, 70 Id. 337, this evidence was for the jury—it made a jury question. The point cannot be removed from the domain of the jury.

The cases of *Holmes v. Pennsylvania Railroad Co.*, 74 N. J. L. 469; *Weiss v. Central Railroad Co.*, 76 Id. 348; *Howe v. Northern Railroad Co.*, 78 Id. 683, distinguished. So, contributory negligence of the decedent was also a jury question under such cases as *Brown v. Erie Railroad Co.*, 87 Id. 487; *Fernetti v. West Jersey, &c., Railroad Co.*, Id. 268.

This disposes of the case, except it is further urged that there was error in the refusal of the trial court to charge each of two specific requests in reference to the statutory signals and the operation of the crossing gates; each request covers separate charges of negligence. The judgment must be reversed, so it is argued, because the trial judge permitted the jury to base a verdict upon either ground, notwithstanding the specific requests submitted by the defendant with respect to each allegation of negligence. The court in the charge to the jury had covered each ground fully, accurately and clearly. The requests refused were, in effect, to take the case from the jury, hence this was not error, in view of the cases above cited.

The judgment of the Hudson Circuit Court is affirmed, with costs.

90 N. J. L. Ross v. Com'r's Palisades Interstate Park.

P. SANFORD ROSS ET UX., APPELLANTS, v. THE COMMISSIONERS OF THE PALISADES INTERSTATE PARK, RESPONDENT.

Argued February 20, 1917—Decided June 6, 1917.

1. Who is an expert on the value of land, under our decisions, must be left very much to the discretion of the trial judge; his decision is conclusive, unless clearly shown to be erroneous in matter of law.
2. The dominant circumstances forming the qualification of expert witnesses as to land values consist of the fact either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question, within recent periods, or that they have knowledge of such sales by others.
3. The mere fact that a witness owns the land, but has no special knowledge of values, does not qualify as an expert so as to give an opinion as to the value of the land.
4. Valuing land taken under condemnation, underlaid with stone, the stone should not be valued separately and apart from the land, but it may be shown to what extent the land is enhanced in value by the stone. The stone is a component part of the land.
5. It is not error to admit evidence of prices paid by the condemning party for similar lands in the vicinity.
6. In order that the price paid for land in the neighborhood of that being condemned may be evidential, the land must be shown to be substantially similar.
7. The land is to be valued in the condition in which it was on the date of filing the petition and order, fixing the time and place for the condemnation proceedings. *Pamph. L. 1900, p. 81, § 6.*

On appeal from the Bergen Circuit Court.

Before Justices TRENCHARD and BLACK.

For the appellants, *Bedle & Kellogg* and *Alonzo Church*.

For the respondent, *Josiah Stryker* and *John W. Wescott*, attorney-general.

The opinion of the court was delivered by

BLACK, J. This case is an appeal from the verdict of a jury rendered in a condemnation proceeding, tried at the Ber-

gen Circuit. The verdict of the jury was eight thousand (\$8,000) dollars. The award of the commissioners was six thousand six hundred (\$6,600) dollars. The amount of land sought to be taken was three and six (3.6) tenths of an acre.

The land under condemnation is situate in the extreme northerly part of the borough of Fort Lee, Bergen county, and lies between a line drawn parallel with the Hudson river one hundred and fifty (150) feet west of the high-water line of the Hudson river and the steep cliffs of the Palisades. The tract extends about nine hundred and eighty (980) feet along this line, while the distance from the line to the cliffs is one hundred and seventy (170) feet at the northerly end and one hundred and fifty-five (155) feet at the southerly end. Access to the land on the west is shut off by the steep cliffs. The surface of the land is a steep slope from the base of the cliffs to the easterly boundary. The land is bounded on the east by other lands of the appellants, which extend easterly one hundred and fifty (150) feet to the high-water line of the Hudson river and from there to the exterior line for solid filling.

The land in question, and the remainder of the same tract, is wild, unoccupied land, the upland being covered with small trees, underbrush and stones, the whole tract being underlaid with slate and sandstone, and at the westerly end, at an elevation of one hundred and twenty-three (123) feet, with trap rock. There is no communication with the land by railroad, trolley or wagon road; none of the land under the Palisades, north of the tract, has ever been used for industrial purposes, and the nearest land under industrial development is two and six (2.6) tenths miles southerly in the adjoining borough of Edgewater.

The grounds of appeal are thirty-eight in number. They are argued, however, under eight (8) heads, in the appellants' brief. They all challenge the rulings of the trial court and allege trial errors as grounds for a reversal of the judgment. The principal ones, however, relate to the court's exclusion of the opinion of appellants' experts as to the value of the land taken. The witnesses offered by the appellants for this

90 N. J. L. Ross v. Com'rs Palisades Interstate Park.

purpose were Mr. Frederick Dunham, a civil engineer; Mr. Floyd S. Corbin, a real estate broker of water front and dock properties in the harbor of New York; Mr. John H. Ehrehardt, a consulting engineer; Mr. Edlow W. Harrison, a distinguished civil and consulting engineer. Mr. Harrison has had long and varied experience in valuing railroad lands in New Jersey for taxation, since 1884, particularly as to the value of the railroad terminal lands in Hudson county. He has been called as an expert on many features of the litigation involving the taxation of railroad property since the passage of the Railroad Tax act of 1884. Mr. Joseph E. Snell is a civil engineer of Newark. Mr. P. Sanford Ross, the appellant and owner of the property under condemnation, is an engineer and contractor. Mr. Dunham testified that he had no familiarity with sales of property under the Palisades, in the vicinity of the Ross property; that he had made no effort to keep in touch with sales of land under the Palisades, in the borough of Fort Lee. Mr. Corbin had no familiarity with the sale of any water front property, in the borough of Fort Lee, or with the sale of any property anywhere, which had the same physical characteristics and the same lack of any means of communication, as the property under condemnation, or the tract of land of which it formed a part. Mr. Ehrehardt had not bought or sold property in Bergen county; he had no knowledge of any sale of any land lying along the Hudson river anywhere in Bergen county. Mr. Harrison testified that the nearest property to the Ross tract, of which he had any knowledge, was the Koch property, which was located one mile south of the Ross property, his familiarity with this property being acquired by appraising it; he had no familiarity with values of land in the borough of Fort Lee, except this one appraisal of the Koch property; he knew of no sales of any property similar or like the Ross property; furthermore, the record does not show any question overruled by the trial court, put to him, as to the value, but it does show that the trial judge said he would sustain the objection. Mr. Snell testified that he had never purchased or sold any land in the vicinity of the tract under condemnation; that he had

Ross v. Com'rs Palisades Interstate Park. 90 N. J. L.

no familiarity with the sale price of any land in that vicinity. Mr. Ross testified that he had no knowledge of sales of water front property under the Palisades north of the land under condemnation; that he had made no effort to learn the sale prices of such property; he had no knowledge of either values or purchase prices of any property in the borough of Fort Lee, except the piece under condemnation and the tract of which it was a part, which he purchased in 1882.

The primary question in this case for solution, then, is whether, under our cases, it was error to reject the opinion of these witnesses, on the value of the land under condemnation. Who is an expert under our decisions must be left very much to the discretion of the trial judge; his decision is conclusive, unless clearly shown to be erroneous in the matter of law. *Manda v. Delaware, Lackawanna and Western Railroad Co.*, 89 N. J. L. 327; *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 Id. 189; *Elvins v. Delaware, &c., Tel. Co.*, 63 Id. 243; *State v. Arthur*, 70 Id. 425.

Our Court of Errors and Appeals, speaking on this precise point, said: "Evidently, in the view of these authorities, the most material circumstance forming this qualification of expert witnesses as to land values consists of the fact, either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question within recent periods, or that they have knowledge of such sales by others. How recent the occurrence of such sales, in point of time, and how near in location, and how nearly similar in comparison must, of course, vary with the circumstances of each case, and it is therefore impossible to define a general rule applicable to all cases." *Brown v. New Jersey Short Line Railroad Co.*, 76 N. J. L. 795, 797.

So, the court, in speaking of a former owner of land for six or seven years, said: "Hence, to say nothing of personal capacity or of study or practice, there was shown on his part no opportunity to observe, and no actual observation, in the locality of the land which fitted him to speak of its value. The witness had no special knowledge of values, which, being imparted to the jurors, could aid them in the discharge of their duty." *Walsh v. Board of Education of Newark*, 73

90 N. J. L. Ross v. Com'rs Palisades Interstate Park.

N. J. L. 643, 647. The witness must have some special knowledge of the subject about which he is called upon to express an opinion. *Crosby v. City of East Orange*, 84 *Id.* 708, 710; *Elvins v. Delaware, &c., Tel. Co.*, *supra*.

A witness to be an expert must have more than a general knowledge of the subject under investigation. Authorities from other jurisdictions applying a different rule are not binding on this court. It is sufficient to say, in the language of Mr. Justice Dixon, that if in other states, a more liberal rule is applied respecting the opinion of witnesses as to the value of real estate; "the worthlessness of such testimony is hardly a stronger reason for its rejection than the practically limitless amount of it that might be produced." *Laing v. United New Jersey Railroad, &c., Co.*, 54 N. J. L. 576, 578.

In our reports the rule has been applied in the following illustrative instances to the opinion of witnesses on the valuation and damage to land. A witness has qualified as an expert, who has a knowledge of sales of lots and portions of lands similar to and in the immediate neighborhood of the condemned land; the land so sold was within a radius of two miles from the land in question, and within a period of three years from the date of the giving of the testimony. *Brown v. New Jersey Short Line Railroad Co.*, *supra*.

A farmer is not an expert, as to the damage done to a farm by the building of a railroad, other than for farming purposes. *Pennsylvania Railroad Co. v. Root*, 53 N. J. L. 253. Real estate agents residing six miles distant from the property, who had nothing to do with property in the vicinity or anywhere near it, are not experts on the question of rents. *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407; *affirmed*, 25 *Id.* 513.

Ordinary real estate agent is not an expert as to the value of the private title in a strip of land lying on a public highway, separated by the street from private property, nor as to damages done to the owner of the abutting property, by appropriating that strip to railroad purposes. *Laing v. United New Jersey Railroad, &c., Co.*, 54 N. J. L. 576. Real estate agent is not an expert to give his opinion on difference be-

Ross v. Com'rs Palisades Interstate Park. 90 N. J. L.

tween value of the property either to rent or sell estimated with the railroad in the street and the value without the railroad. *Thompson v. Pennsylvania Railroad Co.*, 51 *Id.* 42. Not simply because witness resided on the property or because the witness owned and resided upon adjoining property. *Riley v. Camden, &c., Railway Co.*, 70 *Id.* 289. A real estate agent, is not an expert as to the amount of depreciation caused by the existence of a sanitary sewer running through the premises. *Morrell v. Preiskel*, 74 *Atl. Rep.* 994. Nor is a real estate agent an expert, who is familiar with prices of property in the neighborhood, as to the value of land after the construction of a tunnel with its present value. *Pennsylvania, New Jersey and New York Railroad Co. v. Schwarz*, 75 N. J. L. 801.

The fact that a real estate agent on one occasion was able to lease a farm having a water-supply, in preference to one which had not, affords no basis for an opinion concerning the difference in rental value between the two. *Crosby v. City of East Orange*, 84 N. J. L. 708.

Knowledge of real estate values in the locality does not qualify witness to testify to the diminution in value of property, by reason of the destruction of shade trees standing in the highway in front of it. *Burrough v. New Jersey Gas Co.*, 88 N. J. L. 643. Or such knowledge in a township. *Van Ness v. New York, &c., Tel. Co.*, 78 *Id.* 511. Valuation of adjoining railroad terminals is a basis of qualification of members of board of assessors making the valuation. *Long Dock Co. v. State Board of Assessors*, 89 *Id.* 108. An experienced real estate man of large experience is not an expert on the question as to the fair value of the connection and use of a sewer condemned. *Park Land Corporation v. Mayor, &c., of Baltimore*, 98 *Atl. Rep.* 157. A witness with some knowledge of real estate is not an expert on the value of shade trees. *Elvins v. Delaware, &c., Tel. Co.*, 63 N. J. L. 243.

From the rule thus stated, and its application made by our courts, it was not error for the trial court to exclude the opinion of these witnesses, on the value of the land under condemnation.

Nor was it error to admit the opinion of the witness Wil-

90 N. J. L. Ross v. Com'rs Palisades Interstate Park.

liam O. Allison. He had bought and sold property in the borough of Fort Lee of the same peculiar quality; he qualified, as an expert, under the cases above cited (*Brown v. New Jersey Short Line Railroad Co.*, *supra*); nor was it error to exclude evidence as to the value of the stone in place, under the case of *Manda v. Delaware, &c., Railroad Co.*, *supra*. The stone in place is a part of the land; it cannot be valued separately and apart from the land, to what extent, if any, the value of the land is enhanced by the stone may be shown. The value of the land, as stone land suitable for quarrying is a proper subject of consideration, both by the witnesses and the jury in fixing the amount of just compensation to be awarded, but not the value of the stone separately and apart from the land. The value of the land is not measured by such facts. The stone is a component part of the land. *Reading, &c., Railroad Co. v. Balthaser*, 119 Pa. St. 472, 482; 126 Id. 1, 10; *Norfolk, &c., Railway Co. v. Davis*, 58 W. Va. 620, 626; *St. Louis, &c., Railway Co. v. Cartan Real Estate Co.*, 204 Mo. 565, 575; *Gardner v. Inhabitants of Brookline*, 127 Mass. 358; *Tri-State Tel., &c., Co. v. Cosgriff*, 19 N. D. 771; 26 L. R. A. (N. S.) 1171; 10 R. C. L. 129, § 112; *Lew. Em. Dom.* (3d ed.), §§ 724, 725; 15 Cyc. 758. These cases cited as supporting a different principle are not in point: *Dewey v. Great Lakes Coal Co.*, 236 Pa. St. 498, 500; *Cole v. Ellwood Power Co.*, 216 Id. 283, 290; *Seattle, &c., Railroad Co. v. Roeder*, 30 Wash. 244.

Nor was it error to admit the testimony of Frank Clark, whether the stone in question would make concrete. So, it was not error to admit in evidence the prices paid by the condemning party for similar lands in the vicinity. *Curley v. Mayor, &c., Jersey City*, 83 N. J. L. 760; *Hadley v. Freeholders of Passaic*, 73 Id. 197. So, it was not error to exclude the purchase price of the Carpenter tract; it was not substantially similar land or of the same peculiar quality. The purchase price included the quarry, machinery and goodwill of a quarry plant in operation. *Manda v. Delaware, &c., Railroad Co.*, *supra*; *Brown v. New Jersey Short Line Railroad Co.*, 76 N. J. L. 795; *Manda v. City of East Orange*,

Ross v. Com'rs Palisades Interstate Park. 90 N. J. L.

82 *Id.* 686. Nor was it error to admit the opinion of Dr. Henry B. Kümmel, state geologist of New Jersey, with regard to the danger of stones falling from the cliffs along the Palisades, at the Ross property. Nor was it error, on cross-examination, to permit the witness Charles W. Stanisforth to testify as to the specifications of the dock department of New York City; it was admissible to test his knowledge of the various specifications which he said he had prepared. Nor was it error to exclude Joseph E. Snell from answering the question: "In your opinion does the taking of the three and six-tenths acres from Mr. Ross' property injure the remaining?" when the witness was permitted to answer the following question: "Does the taking of the three and six-tenths acres render this property less available for commercial purposes?" Under the third ground of appeal, to the witness Frederick Dunham, this question was asked: "Do you know whether the railroad has been laid out further up the river?" This was overruled on the ground that the best evidence as to whether a railroad had been laid out would be the papers, if any, in the secretary of state's office. This was not error, but under this head, counsel for the appellants argued at some length that the trial court excluded relevant evidence tending to show the adaptability of the land for commercial purposes; it is sufficient to say, in answer to this, that the record, so far as we have been able to find, does not in fact show any such evidence excluded by the trial court. Nor do we find any error in the charge of the court to which error is assigned. This is contained in the thirty-first to the thirty-eighth grounds of appeal. The precise point of alleged error in the charge of the trial court is not made clear, and it hardly needs any extended discussion. The charge is in conformity to the cases in our reports, on the points excepted to. *Packard v. Bergen Neck Railway Co.*, 54 N. J. L. 553; *Manda v. City of Orange*, 82 *Id.* 686; *Manda v. Delaware, &c., Railroad Co.*, *supra*.

The charge of the court that the jury were obliged to value the land in the condition in which it was on the 12th day of January, 1914, which was the date of the filing of the petition

90 N. J. L. Society, &c., v. Bd. Conservat'n & Developm't.

and order thereon, fixing the time and place for commencing the condemnation proceedings, was correct, as required by statute. *Pamph. L.* 1900, p. 81, § 6; 2 *Comp. Stat.*, p. 2184, § 6; *Manda v. Delaware, &c., Railroad Co.*, *supra*.

Finding no error in the record, the judgment of the Bergen County Circuit Court is affirmed, with costs.

THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, PROSECUTOR, v. BOARD OF CONSERVATION AND DEVELOPMENT, NORTH JERSEY DISTRICT WATER SUPPLY COMPANY ET AL., RESPONDENTS.

Argued June 6, 1917—Decided September 14, 1917.

Upon an application by the District Board of Water-Supply Commissioners, under the act of 1916, page 129, to the Board of Conservation and Development, created by the act of 1915, page 426, for its approval and consent to the diversion of water for an additional water-supply to the cities of Newark and Paterson, the Board of Conservation and Development has power to attach reasonable terms and conditions to its approval and consent, which are germane to the subject-matter. For such terms and conditions, in this case, see this opinion.

On *certiorari*.

Before Justices SWAYZE, BERGEN and BLACK.

For the prosecutor, *Humphreys & Sumner* and *Gilbert Collins*.

For the state, *John W. Wescott*, attorney-general.

For the city of Newark, *Harry Kalisch*.

For the city of Paterson, *Francis Scott*.

For North Jersey District Water-Supply Commission, *Spaulding Frazer*.

Society, &c., v. Bd. Conservat'n & Developm't. 90 N. J. L.

The opinion of the court was delivered by

BLACK, J. Approval of the application of the North Jersey District Water-Supply Commission and a consent to the diversion of water from the Wanaque river, as proposed therein, for an additional water-supply for the cities of Newark and Paterson, was given by the Board of Conservation and Development on the 19th day of December, 1916. This approval was made under a petition filed by the North Jersey District Water-Supply Commission on the 9th day of October, 1916.

The Board of Conservation and Development was created by an act of the legislature approved April 8th, 1915. *Pamph. L.*, p. 426. The *certiorari* was issued in this case to test the legality of such approval and consent.

The approval and consent was given subject to the following terms and conditions:

1. The North Jersey District Water-Supply Commission shall pay or cause to be paid to the state on behalf of each of the municipalities supplied with water under this approval such annual charge as is now made or may be hereafter authorized by law.

2. This approval shall not become operative unless said commission shall have filed with this board within ninety days from date hereof its written agreement accepting the terms and conditions hereby imposed.

3. The North Jersey District Water-Supply Commission shall in good faith begin the construction of the storage reservoir mentioned in its application within one year from the date of this approval and shall complete the same within five years.

4. The maximum diversion from the Wanaque river authorized by this approval is an average of fifty million gallons *per diem* for any period of thirty consecutive days.

5. The dry-season flow of the Wanaque river below the dam must at all times be maintained at a minimum of twelve million gallons *per diem*.

6. This approval is given subject to the vested rights of all persons, corporations, or municipalities affected by the proposed plan.

90 N. J. L. Society, &c., v. Bd. Conservat'n & Developm't.

7. In the event that any of the conditions herein imposed are violated and such violation shall be established to the satisfaction of this board, this assent shall thereby be abrogated.

The prosecutor has valuable water rights in the Passaic river, of which the Wanaque river is a tributary.

The ground of attack is, that under section 6 of the act of 1916, page 131, the jurisdiction of the Board of Conservation and Development is confined to giving or withholding its consent to the proposed diversion and to nothing else; in other words, the terms and conditions, as set forth above, on which the approval and consent were given, renders it illegal. A correct solution of this question involves, of course, a critical examination of the statutes under which these two boards were created; a short summary or history of such legislation is as follows:

A state water-supply commission was created by an act of the legislature approved June 17th, 1907 (*Pamph. L.*, p. 633); among other things, it provides for the approval of plans for municipal corporations obtaining new or an additional source of water-supply. It may be that act "either approve such application, reject it entirely, or approve the same subject to such reasonable terms and conditions as the commission may prescribe." Section 3, this act, was referred to in *Mundy v. Fountain*, 76 N. J. L. 701; by the act approved April 8th, 1915 (*Pamph. L.*, p. 426), the Board of Conservation and Development, the defendant in this suit, was created as the successor to the state water-supply commission, repealing all acts inconsistent therewith (section 16); but "shall succeed to and exercise all the rights and powers and perform all the duties now exercised and performed or conferred and charged upon the state water-supply commission" (section 5); "The Board of Conservation and Development shall have full control and direction of all state conservation and development projects and of all work in any way relating thereto, except such work as is conferred upon other boards not included within the provisions of this act" (section 7); by the act approved March 16th, 1916 (*Pamph. L.*, p. 128), the state was divided into two water-supply districts, to be known

Society, &c., v. Bd. Conservat'n & Developm't. 90 N. J. L.

respectively as the North Jersey Water-Supply District and the South Jersey Water-Supply District; the act approved March 16th, 1916 (*Pamph. L.*, p. 129), provides for the appointment of district boards as provided and authorized by the previous act, and defining their powers. It was under this act that the commissioners of the North Jersey Water-Supply District petitioned for the consent which is the disputed point in this litigation; section 6, which provides "upon the filing of such petition the said district water-supply commission, after obtaining the consent of the state water-supply commission, or its successor, to the diversion of waters for such water-supply," shall proceed to formulate plans, &c. The argument is, this section provides for a bare consent and nothing more. But this ignores the legislation and the power granted in that legislation to the Board of Conservation and Development above cited. We think it is too plain for argument that under this legislation the Board of Conservation and Development had not only implied but express power to attach to its approval and consent the terms and conditions above set forth, as shown in the record. In addition to what seems to us to be the clear expressed intention of the legislature, these terms and conditions are all strictly germane to the subject-matter that was then before the board for action; they are necessary incidents to make effective, if not efficient, the approval and consent of the board. The construction contended for by the prosecutor is too narrow and artificial; it would strip such approval and consent of its vitality, and, as we think, in direct opposition to the expressed intention of the legislature, viz., that the Board of Conservation and Development had the power to impose those terms as conditions precedent to its approval and consent. The only other question is whether such terms and conditions imposed were reasonable. We think there is nothing unreasonable in any of them. There is nothing else mooted in the record which calls for discussion.

The *certiorari* in this case is dismissed, with costs.

CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY

MARCH TERM, 1917.

THOMAS DELKER, RESPONDENT, v. THE BOARD OF
CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC
ET AL., APPELLANTS.

Argued March 16, 1917—Decided June 18, 1917.

1. It is the judgment, not the opinion, of a court below which is brought before an appellate court for review. If the judgment of the lower court varies from its decision, it may be corrected only by amendment in that court; in the court above it can only be affirmed, reversed or modified.
2. The publishing of official advertisements for municipal corporations in newspapers is neither work, labor nor materials furnished by the owners of the papers to such advertising customers under *Pamph. L. 1912, p. 593*.
3. The act of 1909 (*Pamph. L., p. 92*; *Comp. Stat., p. 3762*), which regulates the price to be paid for public advertising, is not repealed by implication by act of 1912 (*Pamph. L., p. 593*) (there being no express repealer, specific or general), which latter act relates to expenditures by public bodies for the doing of work or the furnishing of materials or labor.
4. Although a municipal corporation advertises for bids or proposals for publishing all official advertising in newspapers, it is not required to award a contract to the lowest bidder, but may contract for such advertising at the price fixed in *Pamph. L. 1909, p. 92*.

Delker v. Freeholders of Atlantic.90 N. J. L.

On appeal from the Supreme Court.

For the respondent, *Clarence L. Cole*.

For the appellants, *Enoch A. Higbee*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. The board of chosen freeholders of the county of Atlantic called for sealed bids or proposals for the publication or printing of all public notices or advertisements authorized by the board, including monthly and annual financial statements.

In response, bids were submitted by the South Jersey Star, Frank Breder, Atlantic City Review, Atlantic City Daily Press and Atlantic City Union, and were as follows: South Jersey Star, seven-eighths cents per line; Frank Breder, six-eighths cents per line; Atlantic City Review, four cents per line for the first insertion and three cents per line for subsequent insertions; Atlantic City Press, ten cents per line for the first insertion, eight cents per line for subsequent insertions; Atlantic City Union, ten cents per line for the first insertion and eight cents per line for subsequent insertions. The proposals were referred to the printing committee, and the minutes of the board show that, on motion, a contract was awarded to the Atlantic City Review and Atlantic City Press at the legal rate as given in the bid of the Atlantic City Press. These two were not the lowest bidders.

The prosecutor-respondent sued out a *certiorari* from the Supreme Court to test the legality of the award. That court in a *per curiam* held that the award of the contract was at a figure much in excess of the statutory limitation, and set the same aside, with costs. This appears to refer to the total cost of the advertising, which would exceed (according to a stipulation in the cause) the \$500 limit of expenditure, without advertising for proposals and awarding the contract to the lowest bidder, as provided by the act of 1912, *infra*. The respondent, the board, has appealed to this court:

It is urged as a ground of appeal that the judgment in the

Supreme Court is not in accord with its opinion, in that the *judgment* sets aside the *proceedings*, with costs, whereas the *opinion* directed the setting aside of the *contract*, with costs.

It is not the opinion, but the judgment, of the court below, which is before this court for review. The reasoning of the judges in a court below is always considered, and, so far as it tends to support the conclusion reached by that tribunal, is given due weight by an appellate court; but the judgment entered in the court below, even if it is different from the court's decision, cannot be amended in the court above; it can only be affirmed, reversed or modified there.

The judgment entered upon the opinion of the Supreme Court in the case at bar recites that that court was of opinion that the *proceedings* under review should be set aside, and so ordered, with costs, the opinion concluding, as above mentioned, that the *contract* should be set aside. The form of the judgment, however, if a matter of importance, could only be corrected by the court which rendered it. See *Hansen v. De Vita*, 76 N. J. L. 330. However, the form of the judgment before us is of no importance in the view which we have reached, for were it one setting aside the *proceedings* under review instead of the *contract* it would have to be reversed. And this brings us to the meritorious question in the controversy, which is one of statutory construction.

Two statutes are involved. The first is *Pamph. L.* 1909, p. 92; *Comp. Stat.*, p. 3762, and the other is *Pamph. L.* 1912, p. 593. The title and pertinent section of the first reads as follows:

"An act to regulate the price to be paid for official advertising.

"1. Hereafter the price to be paid for publishing all official advertising in the newspapers, published in cities of the first and second class, or in counties of the first and second class in this state, shall be at the rate of ten cents per agate (or $5\frac{1}{2}$ point) line for the first insertion, and eight cents per agate line for each subsequent insertion; *provided*, that in computing such charge per line, the lines shall average at least seven words."

Delker v. Freeholders of Atlantic.90 N. J. L.

And the second:

"An act relating to expenditures by public county, city, town, township, borough and village bodies.

"1. Where and whenever hereafter it shall be lawful and desirable for a public body of any county, city, town, township, borough or village to let contracts or agreements for the doing of any work or for the furnishing of any materials or labor, where the sum to be expended exceeds the sum of five hundred dollars, the action of any such public body entering into such agreement or contract, or giving any order for the doing of any work or for the furnishing of any materials or labor, or for any such expenditures, shall be invalid unless such public body shall first publicly advertise for bids therefor, and shall award said contract for the doing of said work or the furnishing of such materials or labor to the lowest responsible bidder; *provided, however*, that said public body may, nevertheless, reject any and all bids."

The prosecutor, who bid for the South Jersey Star, was the lowest bidder, and claimed that the act of 1912, which provides that where a public body in any county, &c., shall make a contract or agreement for the doing of any work or the furnishing of any materials or labor, where the sum to be expended exceeds \$500, the action of such body shall be invalid unless it shall publicly advertise for bids and shall award the contract to the lowest responsible bidder, required that the contract should have been awarded to him. We do not think that this act applies at all to the case at bar.

The advertising under which the bids were received was for proposals for the publication or printing of all public notices or advertisements authorized by the board of chosen freeholders, including monthly and annual financial statements, and that the successful bidder, or the ones to whom the contract should be awarded, must enter into a written contract to publish such legal notices as should be authorized by the board for the price for which they bid, &c. The sort of advertising here called for was clearly official advertising, as provided for in section 1 of the act of 1909, and

90 N. J. L.

Delker v. Freeholders of Atlantic.

was not the doing of work or the furnishing of materials or labor comprehended in the act of 1912.

It is urged on behalf of the respondent that the act of 1912 repealed the act of 1909 by implication, there being no express repealer, specific or general. The Supreme Court held that the two acts could stand together and seems to have treated them as being *in pari materia*. We think they are not; that they contemplate two entirely different subjects, the one of 1909 the matter of official advertising and the one of 1912 the doing of public work, or furnishing materials therefor.

The act of 1909 does not require advertising for bids, and, consequently, the appellant was not required to award the contract to the lowest bidder. This court, in *Trenton v. Shaw*, 49 N. J. L. 638, held that under a provision in the charter of Trenton requiring that all contracts for work or materials for any improvement should be given to the lowest bidder, did not apply to a contract to furnish *rubber hose* for the fire department, because that was not an improvement. In that case advertisement had been made for bids, but the contract was not awarded to the lowest bidder and the action of the common council was set aside in the Supreme Court but was upheld in this court. The doctrine of *Trenton v. Shaw* is applicable to the case at bar.

The judgment under review must be reversed, with costs.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 9.

Eberling v. Mutillod.90 N. J. L.

EMIL EBERLING, BY RUDOLPH EBERLING, HIS NEXT
FRIEND, RESPONDENT, v. MARIUS MUTILLOD, APPEL-
LANT.

RUDOLPH EBERLING, RESPONDENT, v. MARIUS MUTIL-
LOD, APPELLANT.

Argued March 21, 1917—Decided July 18, 1917.

1. The infant plaintiff, a boy sixteen years old, testified that he had been in the business of delivering newspapers on defendant's estate to him and his tenants, for about a year, and that on the day he was bitten by defendant's dog he was going across defendant's lawn on the regular route he had always taken, having entered through a gate which was open. *Held*, that even if he were a trespasser on defendant's premises he was entitled to recover damages for the injury resulting from the biting by the dog, under the facts in this case, if it were owned by the defendant (which was admitted), and if defendant knew that the dog had previously bitten other people, of which there was evidence, and unless the plaintiff was guilty of contributory negligence, aside from the mere fact of trespassing, and he was not, according to his own testimony.
2. The mere fact of trespassing upon the grounds of another is not, in and of itself, contributory negligence which will defeat an action to recover damages for injuries inflicted by a vicious animal belonging to defendant and allowed to be at large upon the premises.
3. The question whether a person entering upon the grounds of another without invitation or license, and then and there injured by an attack by a vicious animal of the owner allowed to be at large upon the premises, exercises the degree of care which reasonable and prudent persons would use under like circumstances, is a jury question.

On appeal from the Hudson County Circuit Court.

For the appellant, *Frederick K. Hopkins*.

For the respondent, *Harlan Besson*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. These cases arose out of injuries resulting to a boy from being bitten by a dog. They were tried together before a jury and were argued together here. In the first action the plaintiff, Emil Eberling, a minor, sued by his father as next friend, and in the other action the father sued for himself.

In March, 1915, the plaintiff, Emil Eberling, was employed in delivering newspapers afternoons. He was a boy sixteen years old.

Two verdicts were rendered, one for the boy of \$400 and one for his father for \$23.50, against the defendant, Marius Mutillod, in the Hudson County Circuit Court by a jury, and judgments were thereupon entered. The defendant has appealed to this court.

The plaintiff, Emil Eberling, was a newsboy living in the borough of Secaucus with his father, from whom he had not been emancipated. The defendant, Marius Mutillod, was a florist, owning an estate in the borough of Secaucus, Hudson county. He was the owner of a large St. Bernard dog, which he permitted to run at large on his property. It was established that his dog had attacked a man named Fred Montigel when the defendant, its owner, was present, some time before, and ruined a pair of trousers for which the defendant paid. There was also testimony that the dog had bitten another man, who had told the owner of it. It appeared from the testimony that it was the custom of the newsboy plaintiff to enter the gate in the northern part of Mr. Mutillod's property and cross the lawn to one of the houses situate on his estate. On March 13th, 1915, while delivering papers to Mr. Mutillod's tenants, the boy was attacked by the defendant's dog, which was roaming at large upon the latter's estate. The dog bit the boy several times in the hip. The bites were severe and he required the care of a doctor for some time.

The defendant's land was only partially enclosed by a fence in which there were large gates, which were open most of the time, and in that situation the defendant's dog was permitted

by him to run at large on the premises. The boy entered through an open gate at the time he was bitten.

Defendant's counsel moved to nonsuit at the end of plaintiff's case, and for a direction of a verdict at the close of the testimony, both of which motions were denied, and the cases were submitted to the jury, who found for the plaintiffs, as stated. These are the only grounds of appeal.

It is perfectly obvious that the defendant-appellant is not entitled to a reversal of the judgments. The reason is that there was evidence to support them, and this court will not review the findings of fact in a court below beyond ascertaining that there was evidence to support such findings. *Larned v. MacCarthy*, 85 N. J. L. 589.

The plaintiffs, under the facts in this case, were entitled to go to the jury if they showed—*first*, that the defendant owned the dog; *second*, if the boy was bitten by the dog and injured; and *third*, if the defendant knew that the dog had previously bitten other people. There was testimony establishing defendant's liability and the plaintiff's right to recover on all of these grounds. Ownership of the dog was admitted by the defendant.

Counsel for appellant relies upon *DeGray v. Murray*, 69 N. J. L. 458, but in our judgment the doctrine in that case is not applicable to the one at bar. It was there held that the owner of a vicious dog will not be liable for injury inflicted by it if it escapes from control, where the owner has exercised a degree of care commensurate with the danger to others which would follow from such an escape. That is not this case. The owner here failed to control the dog. He appears to have regarded it, or at least to have treated it, as being docile and not vicious.

The appellant contends that the infant plaintiff was not upon his premises by invitation or license, but as a trespasser, and that, therefore, he is not liable to respond in damages for the injury to the boy inflicted by the biting by the dog. The doctrine of invitation and license need not be considered, for recovery was properly had even if the boy were a trespasser.

The doctrine is that in an action for injuries caused by an attack by a vicious animal kept by a person on his premises, the mere fact that the injured person was a trespasser at the time will not, as matter of law, defeat the action.

A leading case on this subject is that of *Marble v. Ross*, 124 Mass. 44. There was evidence tending to show that the plaintiffs' intestate received his injuries in the defendant's pasture, where he was at the time a trespasser, and that when he went upon the premises he knew there was a stag there, and understood that it was vicious. It was not contended that the defendant placed the stag in the pasture for the purpose of keeping off trespassers or of having the stag frighten or injure anyone. Mr. Justice Morton said (at p. 48):

"In the case at bar it appeared that the defendant knowingly kept a vicious and dangerous stag in a large pasture, and the plaintiffs' intestate, while in the pasture, was attacked and injured by it. The defendant requested the court to rule that if the plaintiffs' intestate was a trespasser in the pasture, they could not recover. We are of opinion that the court rightly refused this ruling. The mere fact that the intestate was upon the defendant's land without his consent would not defeat the right of action. The unlawful character of his act did not contribute to his injury or affect the defendant's negligence. * * *

"The fact, therefore, that the intestate was committing an unlawful act at the time of his injury would not prevent his recovery. Nor does the fact that this unlawful act was a trespass upon the defendant's land necessarily have this effect. It is true that, as a general rule, a trespasser who is injured by a pit or dangerous place upon the land of another, excavated or permitted for a lawful purpose, cannot recover damages therefor, because the owner of the land owes no duty to him, and therefore was not negligent to him; but it is clear that the owner of land cannot wantonly injure a trespasser. If he does, he is liable civilly as well as criminally. The law holds the keeper of an animal known to be dangerous, which injures another, to the same degree of responsibility as in cases of wanton injury, and the fact that the person injured

Eberling v. Mutillod.

90 N. J. L.

is trespassing does not exonerate such owner from the consequences of his negligence."

And at p. 49 :

"If Marble voluntarily and negligently put himself in a position which was likely to result in injury, and the injury happened, his negligence is a contributing cause, and he could not recover. The fact of his knowledge that the stag was in the pasture and was dangerous would be important evidence tending to show negligence, but we cannot say, as matter of law, that it would conclusively prove it. This might depend upon the size of the pasture, the position of the stag in it, and other circumstances which are proper for the consideration of the jury. The test is, whether the plaintiffs' intestate, in entering the pasture, exercised that degree of care which reasonable and prudent men use under like circumstances. This is a question of fact for the jury upon all the evidence."

We think that *Marble v. Ross* well states the law of the case under consideration. The boy had gone upon the defendant's estate every day for a year to deliver his papers, and at the time he was attacked by the dog he was on the regular route he had always taken. He was not guilty of any contributory negligence, if he is to be believed when he says that he did nothing to excite the dog, which he did not see until it was about five feet away from him. He had only seen the dog once before, and, although someone had told him that it would bite, the tenants said he should not be scared because it would not bite or do anything like that.

In no aspect of the cases at bar can it be said *as matter of law* that the defendant was not liable. The cases were properly submitted to the jury, and the judgments entered upon the verdicts must be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, BERGEN, MINTURN, KALISCH, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 9.

For reversal—None.

90 N. J. L.Fox v. Forty-four Cigar Co.

VORIS FOX, APPELLANT, v. FORTY-FOUR CIGAR COMPANY, RESPONDENT.

Argued March 9, 1917—Decided June 18, 1917.

1. While a party cannot impeach a witness called by him, which is done by showing by general evidence that he is unworthy of belief, he may, nevertheless, show that such witness has made other and different statements from those to which he has testified. That is contradicting, not impeaching, the witness.
2. A communication made by a party to an attorney after the latter's employment has terminated, is not privileged, and the attorney may be compelled to disclose the information so acquired.
3. When a party writes a letter to a member of the bar whose relation as counsel to the former had ceased, if, in fact, there ever had been such relationship between them, which letter contained statements tending to prove a fact concerning the question of master and servant, which was pertinent to the issue, the letter is not a privileged communication and is competent evidence against the party writing it.

On appeal from the Supreme Court.For the appellant, *Bourgeois & Coulomb*.For the respondent, *Clarence L. Cole*.

The opinion of the court was delivered by

WALKER, CHANCELLOR. This was an action at law for damages growing out of an accident to the plaintiff by collision with an automobile while he and another were riding on a motorcycle along a public road in Atlantic county. On August 16th, 1915, the plaintiff and his companion were traveling along the road on the motorcycle, when an automobile driven by a director and officer of the defendant company approached and a collision occurred, which demolished the motorcycle and injured the plaintiff.

One defence was that at the time of the accident the car

was not being used for the purposes of the defendant company, and therefore the company was not liable to the plaintiff.

During the progress of the trial, for the purpose of showing that the car was being used for the purposes of the company, and for the purpose of showing an inconsistent statement made by Max Lipschutz, the assistant treasurer, certain letters to W. Frank Sooy, Esquire, a member of the bar, were offered and admitted in evidence. After the testimony had been concluded, the letters were excluded by order of the court, to which an exception was noted. The judge then directed a verdict in favor of the defendant, to which exception was taken, and the plaintiff appealed.

The defendant company in its answer admitted that on the day of the accident it was the registered owner of a certain touring car which was being driven by Max Lipschutz, who was a stockholder, director and officer of the company, but denied that the car was being driven by him as such stockholder, officer, director, agent or employe.

Max Lipschutz was called by the plaintiff and testified that he was assistant treasurer of the defendant company, whose president was his father, Benjamin Lipschutz, and whose assistant secretary was George M. Lex; that the defendant did quite extensive advertising through New Jersey by signs. He testified to the genuineness of a letter dated December 15th, 1915, as to his own and Lex's signatures thereon. Asked what was the object of his tour through South Jersey on the day in question he answered that he had promised his sister, who was sick, a little ride and outing for her friends, and it was for that purpose alone that he took them out that afternoon. Asked whether at that time he was engaged on the business of the company, he answered that he always looked around (meaning for and at the signs), but that the idea of taking them out that day was for pleasure alone. He could not remember whether he stated to the officers of the company that he was going out on the business of the company that day. Shown the letter again and asked to

90 N. J. L.Fox v. Forty-four Cigar Co.

tell whether he informed the secretary that he was out on the business of the company that day, he first answered "No" and then "Yes." He afterwards said that he had not gone out to inspect the signs on that day.

W. Frank Sooy, Esquire, counselor-at-law, was called by the plaintiff and testified he was one of the firm of Bolte, Sooy & Gill; that he met Mr. Lipschutz, Sr., and Mr. Lipschutz, Jr., and talked the situation over with them; that he was notified by the defendant company that he was representing Max Lipschutz; that he was never formally employed by the company; that he handed the letter in question to Mr. Stern, who was associated with Messrs. Bourgeois & Coulomb, attorneys for the plaintiff, to carry out an agreement he had with Mr. Stern as to the form of answer that would be filed by the company, leaving out, as defendants, Max Lipschutz and his father.

Benjamin Lipschutz testified that he instructed his son Max on the day in question not to take his sister out, but to attend to certain business; that the car had been owned by the company for a couple of years and was bought to entertain customers and for other business; that it was used by his son, by Mr. Funk (secretary of the company) and Mr. Lex; that it was primarily bought for the purposes of the company and the benefit and convenience of its officers, and also for the purpose of taking out his sick daughter.

In view of the testimony of the Lipschutzes—father and son—to the effect that the young man was not out on the business of the company that day, it became highly important to the plaintiff to have in evidence the letter from the assistant secretary to Mr. Sooy, in which it is stated, *inter alia*, that Max Lipschutz would testify at the trial that he was driving the car, *combining both business and pleasure*.

The following is a copy of the letter:

Fox v. Forty-four Cigar Co.90 N. J. L.

"Benjamin Lipschutz, president and treasurer; Mahlon A. Funk, secretary and sales manager; Max Lipschutz, assistant treasurer; George M. Lex, assistant secretary.

Forty-four Cigar Company
Incorporated.

Lipschutz's
44
Cigars

Adlon
Cigars

Business established by Benjamin Lipschutz, 1893.

Main office and factory

N. E. cor. 11th and Wharton streets, Philadelphia.

P. O. address, Southward Station.

Address all communications to company.

December 15th, 1915.

Bolte, Sooy & Gill,
21 Law Building,
Atlantic City, N. J.

Attention of W. Frank Sooy, Esq.

Gentlemen:

The writer has your letter of the 13th inst., addressed to Mr. Max Lipschutz.

The answer as filed by the insurance company is about what we expected, nevertheless, the policy that they issued to us calls for business and pleasure, and as Mr. Max Lipschutz was an officer of the company, we feel, under the terms of the contract, that he had a perfect right to drive the car.

You can rest assured that Mr. Max Lipschutz at the trial will testify.

First—That the company owned the car.

Second—That he was driving the car, combining both pleasure and business.

Third—That he is an officer of the company.

90 N. J. L.Fox v. Forty-four Cigar Co.

In order to fulfill your wishes in the matter, I am having a postscript in this letter which is signed by Mr. Max Lipschutz.

Very truly yours,

"44" Cigar Company, Inc.,

GEO. M. LEX,

Asst. Sec.

L-AH

P. S.

W. Frank Sooy, Esq.,

The facts as covered by Mr. Lex above will be testified to by me at the trial.

Very truly yours,

MAX LIPSCHUTZ."

The letter was offered to contradict Max Lipschutz, and as an admission by the company. Counsel for the defendant states in his brief that there is not the slightest evidence that the writer, who signed himself "assistant secretary," was such, or that he had authority to bind the company. This is evidently a misconception on the part of the learned counsel who argued the case for the defendant. Max Lipschutz testified that he was the assistant treasurer, and that Mr. Lex was the company's assistant secretary. As to whether they had authority to bind the company was, in all the circumstances of the case, at least, inferable. The question remains, Was the letter properly excluded? We think not. It should have been admitted and the case submitted to the jury.

Counsel for the defendant argues that the attempt to put the letter in evidence was for the purpose of impeaching the plaintiff's witness. This is not so; the attempt was to contradict the witness. The inhibition is only that a party calling a witness will not be permitted afterwards to *impeach* his general reputation for truth or veracity by general evidence tending to show him to be unworthy of belief. *Ingersoll v. English*, 66 N. J. L. 463. A party to a suit is not precluded from proving the truth of any particular fact by competent testimony in direct contradiction to that to which any of the witnesses called by him may have testified. *Scrieber v. Public*

Fox v. Forty-four Cigar Co.90 N. J. L.

Service Railway Co., 89 N. J. L. 183. It is always allowable to show that a witness has made other and different statements than those to which he testifies. Vice Chancellor Pitney, in *Thorp v. Leibrecht*, 56 N. J. Eq. 499 (at p. 502), states that the rule forbidding a party calling a witness to offer evidence for the purpose of impeaching his general character for truth and veracity, falls far short of forbidding the party to show by any legitimate evidence that the witness has testified to what is not true in a matter material to the issue. This rule was approved by this court in *Buchanan v. Buchanan*, 73 Id. 544 (at p. 546). Although, in *Thorp v. Deibrecht* and *Buchanan v. Buchanan*, the witnesses called by complainants were defendants, the rule is not restricted to such witnesses—that is, witnesses who are adversary parties, but is as broad as the statement in *Buchanan v. Buchanan* (at p. 546), that “the rule against impeachment denies the right to impeach the general reputation of the witness for truth, but does not deny the right to show that the whole or any part of the testimony of the witness is untrue.” In fact, counsel for defendant concedes this in his brief, where he says: “While the law permits one who calls a witness to contradict him, it does not permit impeachment.” Impeachment, as shown, is an attack upon a witness’ *general* reputation for truth and veracity; and as that which was attempted in this case was not such an attack, but only a contradiction of the witness’ statement, the letter was admissible upon that score.

It is next objected on behalf of the defendant that the letter was a privileged communication by defendant addressed to the attorneys, Messrs. Bolte, Sooy & Gill. While addressed to them, it was marked for the “Attention of W. Frank Sooy, Esq.,” who appears to have had charge of the matter, so far as his firm was concerned with it, if at all. Mr. Sooy was called as a witness by the plaintiff and asked whether he, or his firm, represented the defendant company, and answered that he would rather tell what they did; that he did not know how to answer the question rightly. He also stated that he was advised that he was representing Max Lipschutz, and that Judge Starr, he thought it was, would take care of the defendant company. As a fact, Judge

90 N. J. L.

Fox v. Forty-four Cigar Co.

Starr did represent the company, filed their answer and tried the case. It is a fact, also, that Mr. Sooy's bill was made to Max Lipschutz and paid by him. Besides, if Messrs. Bolte, Sooy & Gill were retained by the defendant, their representative capacity ceased on December 11th, 1915, when they received a letter from the defendant, signed by the assistant secretary, Lex, in which the company said: "Please leave the insurance company attend to looking after the "44" Cigar Company's interests and you look after the interest of Mr. Benjamin Lipschutz and Mr. Max Lipschutz, personally, as they no doubt have arranged for."

There is no privilege as to communications made to an attorney after his employment has terminated. 4 *Wigm. Ev.*, § 2304; 40 *Cyc.* 2366.

These two letters were declarations by the company which were admissible in evidence, the one of December 11th to show that the firm of Bolte, Sooy & Gill did not represent the defendant company, at least after that date, and the one of December 15th that the company owned the car, and that Max Lipschutz was one of its officers who had a right to drive it, and was driving it on business as well as pleasure.

The remaining contention on behalf of the defendant is that the testimony failed to disclose that Max Lipschutz, the driver of the automobile at the time of the accident, was a servant of the corporation defendant, *engaged on its business*. Without deciding this question on the evidence which was before the court at the time of the direction of the verdict for the defendant, it is apparent, as stated, that if the letter of December 15th, 1915, had been in evidence, it might have been inferred—if the jury found the other questions raised by the pleading and evidence in favor of the plaintiff—that the defendant company was liable for the consequences of the accident which was the subject of the controversy in the suit. No citation of authority is necessary to support so plain a proposition.

The letter of December 8th, 1915, from the defendant company to Messrs. Bolte, Sooy & Gill, which is referred to in the letter of December 11th, and which indicates that that firm represented the Lipschutzes—father and son—and not

Gaffney v. Illingsworth.

90 N. J. L.

the defendant company, was pertinent evidence and should have been admitted; not so the letter of January 25th, 1916, written to Messrs. Bolte, Sooy & Gill by Max Lipschutz, personally, in which he enclosed his own check, with thanks to Mr. Sooy, or the firm (it not being stated which), for services rendered. This was properly excluded.

The judgment of the court below must be reversed, to the end that a *venire de novo* may be awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

JOHN GAFFNEY, RESPONDENT, v. WILLIAM H. ILLINGSWORTH, APPELLANT.

Argued March 13, 1917—Decided June 18, 1917.

1. Under the Practice act (*Pamph. L. 1912, p. 377, § 32*), and rules 72 and 73 annexed, and Supreme Court rules, 1913, Nos. 131, 132 and 219, a judge of the Circuit Court has power to grant a new trial because of inadequate damages awarded by the verdict of a jury, and, under rule No. 122, to impose terms that if the defeated party pays a certain sum within a specified time, the rule to show cause why a new trial should not be granted shall be discharged, otherwise made absolute. *Semble*: that the trial court could impose such terms without the aid of statute or rule of court.
2. The granting of a new trial rests in the sound discretion of the trial court, and, as it does not settle definitively the rights of the parties, it is not appealable.

On appeal from the Essex County Circuit Court.

For the appellant, *M. Casewell Heine*.

For the respondent, *Grosken & Moriarty*.

90 N. J. L.

Gaffney v. Illingsworth.

The opinion of the court was delivered by

WALKER, CHANCELLOR. This action was brought in the Essex County Circuit Court for damages for personal injury suffered by the alleged negligence of defendant. It was tried before Judge Dungan and resulted in a verdict for the plaintiff in the sum of \$190.25, and costs. Rules to show cause were taken by plaintiff and defendant, respectively, and, upon argument, the court discharged defendant's rule and made an order granting to plaintiff a new trial as to damages only, provided, that if the defendant paid \$480.50, within ten days, the plaintiff's rule should be discharged. The defendant did not make the payment, and the plaintiff's rule became absolute. The propriety of the Circuit Court judge's action in this regard is drawn in question by the appeal.

The defendant argues that upon common law principles a trial court has no power to set aside a verdict as *inadequate* and to grant a new trial *as to damages only*. Without pausing to consider the force of these particular objections, a perfect answer is found in the Practice act (*Pamph. L. 1912, p. 377*), which provides, in section 32, that the Supreme Court shall prescribe rules for that court and for the Circuit and Common Pleas Courts, and that such rules shall supersede (so far as they conflict with) statute and common law regulations theretofore existing, and that, until such rules be made, the rules thereto annexed shall be deemed the rules of the court. Rules 72 and 73 (at *p. 397*) are as follows:

"72. In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

"73. When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects."

The Supreme Court in 1913 made rules to take effect December 1st, 1913, and, among them, adopted rules 72 and 73 annexed to the Practice act (1912), making them rules 131 and 132 of those then promulgated, and provided in rule 219

that the rules of the Supreme Court should, so far as appropriate, be applicable to the practice of the several Circuit Courts. The appropriateness and applicability of these rules cannot be doubted. Therefore, the trial judge had the right to grant a new trial on the sole question of the inadequacy of the damages by virtue of the statute and rules mentioned, the question of damages being clearly separable from that of liability; and the only question remaining is, had he the power to couple the rule for a new trial with terms, namely, that if the defendant paid a certain sum within a specified time, the rule should be discharged?

Counsel for appellant contends that the imposition of the terms mentioned upon the defendant was unwarranted. He cites no authority to sustain this proposition.

Quite aside from any question of the court's inherent power to impose terms, the appellant is here again met with a positive rule of the Supreme Court, which provides that the judge to whom an application for a rule to show cause whether a new trial should be granted, shall exercise the same discretion in granting such rule as was then exercised by the court, and shall prescribe the terms, that is, the terms upon which the rule may be granted. *Supreme Court Rules, 1913, No. 122.*

The power of the court in granting a new trial upon the ground that the damages are *excessive*, upon terms that a new trial shall be had unless the plaintiff will accept a certain sum named, less than that awarded by a verdict, is too well established to be questioned. It would seem to follow, by parity of reasoning, that when a new trial is granted because the damages are inadequate, the court may impose like terms, that is, terms to the effect that if the defeated party will pay a certain sum, greater than that awarded by the verdict, the rule will be discharged; subject, doubtless, to the power of an appellate court to vacate any such terms when they appear to be an abuse of discretion. No such showing is made on the record before us, and this makes it inappropriate for us to give consideration to the appellant's other contention, namely, that the verdict, as it stands, is adequate and proper and evinces no prejudice or partiality on the part of the jury.

As to whether or not the verdict is adequate and proper, is, on application for a new trial, a matter of sound discretion in the trial court, and in the absence of an abuse of discretion, the appellate court cannot review the trial court's action. And with the question of damages, apart from such discretion, we have nothing to do.

These views lead to an affirmance. But affirmance also is to be rested upon another ground, namely, that the order under review is not appealable.

An appeal, which was substituted by the Practice act (1912) for a writ of error, lies only when the decision sought to be reviewed has not proceeded from a matter resting in discretion, but has settled definitively in the suit or proceeding the rights of the parties. *Eames v. Stiles*, 31 N. J. L. 490, 494; *Defiance Fruit Co. v. Fox*, 76 Id. 482; *Knight v. Cape May Sand Co.*, 83 Id. 597; *Handford v. Duchastel*, 87 Id. 205. The proceedings of the Circuit Court in a common law action are reviewable only after final judgment. *Taylor Provision Co. v. Adams Express Co.*, 72 Id. 220.

It is obvious that the decision in question does not definitively settle the rights of the parties in the cause. A finality would eventuate from a judgment resulting from a new trial granted. Besides, as stated, the question of granting a new trial is a matter of sound discretion, 3 Bl. Com. 392. That the granting of a new trial rests in the discretion of the court is fully established by all authorities. *Hilliard on New Trials*, § 6, citing *Gray v. Bridge*, 11 Pick. 188, wherein (at p. 191) it is held that the decision of that question is not appealable. And our Supreme Court, in *Mitchell v. Erie Railroad Co.*, 70 N. J. L. 181, held (at p. 183) that in the Circuit Courts the matter of granting a new trial is discretionary, and not reviewable upon error.

The judgment under review will be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

THE ATTORNEY-GENERAL, EX REL. HUDSON COUNTY
QUARTER SESSIONS, PLAINTIFF IN ERROR, v. WIL-
LIAM P. VERDON, DEFENDANT IN ERROR.

Argued November 29, 1916—Decided October 11, 1917.

1. A proceeding in contempt, the sole purpose of which is the punishment of the alleged contemner, and the vindication of the dignity and authority of the court, is not reviewable by an appellate tribunal, in the absence of legislative authority, except for lack of jurisdiction in the court in which the proceeding is had.
2. Section 2 of "An act providing for the review of conclusions and judgments for contempt of court" (*Pamph. L. 1884, p. 219; Comp. Stat., p. 1736, § 138*), makes it mandatory upon the Supreme Court in all appeals taken thereunder to rehear the matter of contempt upon which the conviction was founded, *de novo*, both upon the law and upon the facts.
3. A person who has been proceeded against in a court of law in this state, on a charge of contempt, the sole purpose of the proceeding being to punish the alleged contemner and vindicate the dignity and authority of the court, is not, as a matter of right, entitled to have the procedure conducted by the submission of interrogatories.

On error to the Supreme Court, whose opinion is reported *eo nomine, In re Verdon*, 89 N. J. L. 16.

For the plaintiff in error, *George T. Vickers*, assistant prosecutor of the pleas, and *Robert H. McCarter*.

For the defendant in error, *Harlan Besson* and *Merritt Lane*.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. William P. Verdon, the defendant in error, was adjudged by the Hudson County Quarter Sessions to be guilty of a contempt of that court, by reason of certain newspaper publications reflecting upon it, and tending to bring it into disrepute. The proceeding was instituted by a rule to show cause. At the hearing upon the return of this rule Verdon appeared and insisted that the court

90 N. J. L.

Attorney-General v. Verdon.

should not proceed against him by the taking of testimony to try the question of contempt, but should submit interrogatories to him for his answers thereto. His claim was overruled, and witnesses were called and examined by the assistant prosecutor over his objection, whereupon Mr. Verdon announced that he elected to stand mute. At the close of the testimony the judgment of the court was pronounced and thereupon Verdon appealed to the Supreme Court, "in accordance with the statute in such case made and provided," to review the judgment against him both upon the law and the facts. Upon the hearing of the appeal the Supreme Court considered that the Quarter Sessions in refusing to submit interrogatories to Verdon, violated a fundamental right vested in him; that in proceeding to judgment in disregard of that right it exceeded its jurisdiction; and thereupon ordered that the judgment of the Quarter Sessions be set aside, and for nothing holden, and that the record be remitted. From the judgment entered upon this order the attorney-general appeals.

A proceeding in contempt, the sole purpose of which is the punishment of the alleged contemner, and the vindication of the dignity and authority of the court, is not reviewable by an appellate tribunal, in the absence of legislative authority, except for lack of jurisdiction in the court in which the proceeding is had. *Seastream v. New Jersey Exhibition Co.*, 72 N. J. Eq. 377. This principle is equally applicable to common law courts and to equity tribunals; and where a person adjudged guilty of contempt in a court of law seeks to review the judgment upon the ground of want of jurisdiction, the proper means for obtaining such review is by taking out a *certiorari* from the appellate tribunal. *Croasdale v. Quarter Sessions*, 88 N. J. L. 506; 89 *Id.* 711.

In 1884, however, the legislature enacted a law entitling the person adjudged to be guilty of contempt by a court of law inferior in its jurisdiction to the Supreme Court, to appeal to the Supreme Court for a review thereof both on the law and the facts (*Comp. Stat.*, p. 1736); and this is the statute under which Verdon sought a review in the present

case. Section 2 of the act provides the method of procedure to be followed by the Supreme Court in all appeals taken under it. The legislative mandate is that upon the petition of a person convicted of contempt by any court of law inferior in its jurisdiction to the Supreme Court, he may have that conviction immediately certified and sent to the latter tribunal, together with all proceedings touching the same, and then declares that the Supreme Court "shall be invested with jurisdiction, and *required to rehear* the matter of contempt upon which the conviction was founded, both upon the law and upon the facts, which shall be inquired into and ascertained by depositions, or in such other way or manner as the court above shall direct; and it shall be required to give such judgment in the premises as to it shall seem to be lawful and just under all the circumstances of the case, to be enforced in such way and manner as it shall order and direct."

The manifest purpose of the act is to afford the appellant a trial *de novo* both upon the law and the facts, before an entirely impartial tribunal.

It is, of course, true that if in pronouncing the judgment complained of by him the Court of Quarter Sessions overstepped its jurisdiction, Verdon would have been entitled to review the judicial action by *certiorari*. *Croasdale v. Quarter Sessions, supra*. But it is equally true that it was within his election to avail himself of the benefit given him by the statute of 1884, and have the question of the truth of the charge laid against him tried out and determined in the manner provided by the statute, by a tribunal which had no interest in the matter involved; and, having made that election, the attorney-general was entitled to hold him to it. The action of the Supreme Court in remitting the record to the Quarter Sessions in order that the case might there be retried, was, as it seems to us, in disregard both of the right of Mr. Verdon to have an adjudication by the appellate tribunal on the law and the facts, and also in disregard of the right of the attorney-general to have Mr. Verdon held to the election which he had made.

The failure of the Supreme Court to proceed under the statute requires a reversal of its judgment, and a remission of the record to it in order that it may, in the language of the statute, *rehear* the matter of contempt upon which the conviction was founded, both upon the law and upon the facts, by the taking of depositions, or in such other way or manner as it shall deem advisable, and render such judgment thereon as shall seem to it to be lawful and just under all the circumstances of the case.

On account of the importance of this matter, not only to the defendant, but to the public generally, we deem it proper to say that we are not in accord with the view of the Supreme Court that a person who has been proceeded against in a court of law in this state, on a charge of contempt, the sole purpose of the proceeding being to punish the alleged contemner and vindicate the dignity and authority of the court, is entitled, as of right, to have the procedure conducted by the submission to him of interrogatories, in accordance with the practice existing at common law. In fact, in this state no settled practice seems to exist. As was said by Mr. Justice Dixon, *In re Cheeseman*, 49 N. J. L. 115, 143, sometimes a rule to show cause has been allowed without an affidavit on a mere suggestion; sometimes an attachment has been issued without a rule to show cause; sometimes punishment has been inflicted forthwith on the offender's confession, when brought in by the writ, without interrogatories; and sometimes the penalty has been imposed on the offender's admissions made under the original rule, without either writ or interrogatories. Having pointed out the unsettled state of the practice, Mr. Justice Dixon then declared (and in this declaration we fully concur) that "these various steps are manifestly not jurisdictional, except to the extent of laying before the court matters which constitute a contempt, and affording the party accused a fair opportunity of denying or confessing their truth."

Mr. Verdon had that opportunity afforded him. Instead of taking advantage of it, and either confessing or denying the truth of the charge against him, he saw fit to stand mute. Having so elected it cannot be said with any justice that he

Attorney-General v. Verdon.90 N. J. L.

was deprived of a fundamental right. Nor could he, by adopting the course pursued by him, inject into the case the question of the effect to be given to his denial of the charge, in case he had made such denial—that is, whether such denial would have been conclusive of the matter in issue. The Court of Quarter Sessions having afforded him full opportunity to deny the charge against him, and he having declined to avail himself of that opportunity, the court was entirely within its jurisdiction in proceeding to judgment on the testimony which had been submitted to it.

One other matter remains to be referred to. Although we are not called upon to pass upon the conclusiveness to be given, in the court of first instance, to the alleged contemner's denial of the charge laid against him, it is important that we should express our opinion of its effect when made upon the retrial of the matter in the Supreme Court. The act of 1884 not only prescribes the procedure to be adopted, but, by necessary inference, the effect to be given to the evidence, including that of the alleged contemner. The court is to determine the truth of the charge by depositions taken, or in such other way as it may deem just and proper. That is to say, it was the legislative intent that the very truth of the matter should be determined by the appellate court, and that judgment should be rendered accordingly, the same weight to be given to the testimony of the appellant as would be given to it in any ordinary legal procedure.

The judgment under review will be reversed, and the record remitted to the Supreme Court, to be there proceeded with as above indicated.

KALISCH, J. (dissenting). I have reached the conclusion that the appeal should be dismissed upon the fundamental ground that no appeal lies from the Supreme Court to this court, in a proceeding for contempt, where, as in this case, the proceeding is purely to punish the contemner for the purpose of vindicating the dignity of the court. *Dodd v. Una*, 40 N. J. Eq. 672, 715.

The case cited is valuable to illustrate the inflexibility of the common law rule that no appeal was countenanced in a proceeding for contempt where the sole purpose was to punish the contemner for contumacious conduct. And that learned jurist, Mr. Justice Depue, emphasized the common law on the subject (on p. 718) when he said: "If the case brought up was capable of being treated as the action of the Chancellor taken with a view simply of vindicating the dignity of his court, I would vote to dismiss the appeal." If it will be borne in mind that in that case the appeal was founded on the claim that the order contemned was one without the jurisdiction of the Chancellor to make, it becomes at once manifest that the line of demarcation which Judge Depue draws between the appealability of a proceeding in contempt, the object of which is to afford a method of relief *inter partes*, and where it is of a criminal nature to punish contemptuous conduct in the presence or with respect to the authority or dignity of the court, is both logical and sound. But this is on the assumption that the court whose jurisdiction is challenged had general jurisdiction of the subject-matter and of the party proceeded against.

In *Frank et al. v. Herold*, 64 N. J. Eq. 371, the appellants were adjudged guilty of a contempt and were fined and sentenced to imprisonment for a period of sixty days, by the Court of Chancery, for willfully violating a restraining order of that court. The appeal was dismissed by this court upon the ground that the proceedings were punitive in their character, taken solely for the purpose of vindicating the authority and dignity of the court, and were, consequently, not reviewable. And, in the later case of *Seastream v. New Jersey Exhibition Co.*, 72 N. J. Eq. 377, decided in 1906, this court, speaking through the present learned Chief Justice (on p. 378), said: "The proceeding was instituted solely for the purpose of punishing alleged contemnors, to vindicate the dignity and authority of the court. Such a proceeding is not reviewable by an appellate tribunal, except for lack of jurisdiction in the court in which the proceeding is had."

This language obviously refers to the court exercising original jurisdiction whose authority or dignity has been contemned, and not to an appellate court invested by the legislature with authority to review contempt of inferior courts.

And it was evidently with this situation in view that the legislature, in 1909, passed the remedial statute conferring upon a person or corporation adjudged in contempt by the Court of Chancery, for acts done or omitted elsewhere than in the presence of the court, the right of appeal from such adjudication to this court. *Comp. Stat.*, p. 452, § 113a.

Although the cases referred to arose in the equity branch, nevertheless they are in point on the question discussed, for the reason that the legal principle governing an appeal in contempt cases, except as modified by statute, is the same as on the law side. But before leaving this topic it is well to allude here to the fact that the legislature, in 1884, enacted a statute by which an appeal is given, in a proceeding for contempt, except from the Orphans' Court to the Prerogative Court. This statute will be dealt with *in extenso* later on, for it is upon the construction to be given to it in conjunction with the common law that the present case must turn.

From what has been said it is apparent that there is no legal difficulty in agreeing to the proposition laid down by the learned Chief Justice, in the prevailing opinion, that a proceeding for contempt, the sole purpose of which is the punishment of the alleged contemner, and the vindication of the dignity of the court, is not reviewable, except for lack of jurisdiction in the court in which the proceeding is had, if, by the term "for lack of jurisdiction," is meant want of jurisdiction in the court of the party or subject-matter, or of both.

But where the court, in its constitution, has power to punish for contempt, its decision is final and conclusive. *Dodd v. Una*, 40 N. J. Eq. 715. The opinion of this court proceeds upon the theory that the lack of jurisdiction, in the present case, was not in the court of first instance, in which Verdon was adjudged guilty of contempt, but in the Supreme Court, to which court Verdon appealed, and which latter

court reversed the judgment appealed from. I cannot accede to this.

The position taken by the court necessarily brings into consideration the scope and meaning of the statute of 1884. 2 *Comp. Stat.*, p. 1736, §§ 138, 139.

Section 138 provides that every summary conviction and judgment by any court inferior in its jurisdiction to the Supreme Court, except an Orphans' Court, for a contempt against its own dignity, peace and good order shall be reviewable, both upon the law and upon the facts by the Supreme Court.

It is clear that the broad language here employed invests the Supreme Court with general jurisdiction to review a conviction and judgment for contempt of a court inferior to it, as designated by the statute.

If this section stood alone there could be no question that the jurisdiction conferred is to be exercised in accordance with the common law power of the court relating to the review of a judgment from an inferior court. I am unable to find anything in section 139 which abridges the exercise of the general jurisdiction conferred. A brief consideration of the section will make the matter plain. It is to be observed that this section relates to the procedure to be pursued by a person who has been convicted and adjudged in contempt, in appealing from such conviction and judgment. It provides that the person adjudged in contempt upon filing a petition, signed by at least two counselors, may have his conviction and judgment certified to and sent to the Supreme Court; that the Supreme Court "shall be invested with jurisdiction and required to rehear the matter of contempt upon which the conviction was founded, both upon the law and upon the facts, which shall be inquired into and ascertained by depositions, or in such other way or manner as the court above shall direct; and it shall be required to give such judgment in the premises as to it shall seem to be lawful and just under all the circumstances of the case, to be enforced in such a way and manner as it shall order and direct."

In the enactment of the statute the legislature obviously had in view two classes of contempt—*first*, contempts committed in the presence of the court in which case the proceedings are of the most summary nature and are conducted orally; *secondly*, contempts committed out of the presence of the court, in which the proceedings are by attachment against, and the submission of written interrogatories, to the alleged contemnors. This difference of procedure in the two kinds of contempt was clearly in the legislative mind as evidenced by the provision in section 139, which requires the Supreme Court to rehear the matter of contempt upon which the conviction was founded both upon the law and upon the facts, to be inquired into and ascertained by depositions, or in such other way or manner as the court above shall direct. Such a method of procedure, obviously, was aimed at an appeal from a conviction and judgment of contempt committed in the presence of the court in order that the appellate tribunal should have before it a reproduction of all the facts and circumstances as they were at the time of the alleged contempt in the presence of the court contemned, either by hearing witnesses in such appellate tribunal or by depositions, or in any other manner as the appellate tribunal may direct. But no good reason exists for the hearing of witnesses or the taking of depositions where the contumacious conduct takes place out of the presence of the court, for in such a case the alleged contemner is brought into court by attachment, interrogatories in writing are submitted to him, which interrogatories he is required to answer in writing, and thus both interrogatories and answers present the law and facts of the case.

By section 138 the legislature invested the Supreme Court with general jurisdiction to hear and determine appeals in contempt case, therefore, its judgment is final and not reviewable, even though it may have erred in the matter of procedure. It is to be particularly noted that the jurisdiction to hear and determine the appeal is not made dependent upon the method of procedure adopted by the Supreme Court.

In the present case the alleged contempt was committed out of the presence of the court, which fact appears on the face of the record. The Court of Quarter Sessions did not proceed by attachment and interrogatories, as it was legally required to do, and, therefore, when the appeal was regularly brought before the Supreme Court, under section 139, that court decided, after hearing counsel for appellant and counsel for the state, that the procedure adopted by the lower court against the alleged contemner was erroneous, and thereupon reversed the judgment. And the representative of state is now here, having sued out a writ of error from this court, on behalf of the state, to the Supreme Court, asking this tribunal to review the judgment of the Supreme Court.

But even if the position assumed by the majority court is sound in the assertion that the Supreme Court was in error in failing to rehear the appeal upon the law and upon the facts of the case, such error does not properly constitute a lack of jurisdiction to hear and determine the appeal, but presents rather a case of jurisdiction erroneously exercised, for which, if this had been a case subject to review, by this court, error was assignable and a writ of error would have been the proper remedy.

Moreover, the record on this appeal shows that the only question raised and argued in the Supreme Court was the legality of the procedure adopted by the Quarter Sessions against the alleged contemner. The representative of the state and counsel for Verdon were in accord that that was the only question in the case and it was in that aspect that the case was submitted by counsel in the case, to the Supreme Court for its decision. Verdon did not see fit to avail himself of the privilege accorded him by the statute and ask for a rehearing upon the law and upon the facts of the case. Neither did counsel for the state ask the court for a rehearing.

Apparently, counsel for the state and counsel for Verdon were content to waive the privilege of the statute accorded to the alleged contemner to a rehearing upon the law and upon the facts. The statute contemplates that the person ad-

Attorney-General v. Verdon.

90 N. J. L.

judged in contempt is the one entitled to the privilege of a rehearing. As it is a provision made for his express benefit, there is no legal rule which precludes him from waiving it. At any rate he is not here complaining.

And even in the view that the provision of a rehearing might be availed of by the state, it is a sufficient answer to the complaint of the state made here, that it is not in a position to challenge the jurisdiction of the Supreme Court, because it did not demand a rehearing and acquiesced in the submission of the question of the legality of the procedure in the Quarter Sessions.

In *Dodd v. Una*, 40 N. J. Eq. 672, 713, Mr. Justice Magie said: "Where the subject-matter is within the court's jurisdiction the appearance and submission of parties may justify the assertion of the jurisdiction and prevent their afterward questioning it. *Tompkins v. Schomp*, 45 N. J. L. 488; *Funck v. Smith*, 46 Id. 484."

It is conceded in the present case that the subject-matter was within the jurisdiction of the Supreme Court.

At common law, and before the statute of 1884, the only proper means to review a *judgment*, in a criminal contempt, where want of jurisdiction in the court was alleged, was by *habeas corpus*. In *Dodd v. Una*, 40 N. J. Eq. (on p. 706), this court, by Mr. Justice Magie, said: "In proceedings for contempt the jurisdiction of the court to make the order alleged to have been disobeyed may be questioned on an application for attachment. *People v. Sturtevant*, 9 N. Y. 263. Or on a *habeas corpus*. *Ex parte Fisk*, 113 U. S. 713."

The attempt of this court upon a writ of error to the Supreme Court to review the law and facts dealt with by the Court of General Quarter Sessions is without precedent. Whence does this court derive that jurisdiction? Not from the common law nor by force of any statute.

The Croasdale case, reported in 88 N. J. L. 506, is no authority on the subject. The legality of the procedure removing that case from the Quarter Sessions to the Supreme Court, by *certiorari*, before judgment, and thence to this court by

90 N. J. L.Attorney-General v. Verdon.

writ of error, appears not to have been challenged in either court. It is sufficient to state that such a procedure is contrary to all well-recognized precedents firmly engrained in the law of this state.

If it were competent on this appeal for this court to pass upon the question as to the propriety of the ruling of the Supreme Court, and the propriety of the procedure in the Quarter Sessions, then I would have no hesitancy, in view of the unanimity of text-writers and well-considered cases on the subject, and the general consensus of opinion of the bench and bar, as manifested in a long line of decisions and continued practice, that the procedure pursued by the Quarter Sessions was erroneous. I am, therefore, in full accord with the views expressed by Mr. Justice Garrison in his opinion in the Supreme Court, wherein he sets forth a lucid, accurate and complete exposition of the law and practice relating to contempt cases in this state.

In the Cheeseman case (49 N. J. L. 115, 143) Mr. Justice Dixon does not unqualifiedly declare that the various steps against an alleged contemner are not jurisdictional. They may or may not be according to the circumstances of the case. It must be borne in mind that in the Cheeseman case the learned justice was dealing with the concrete facts of the case before the court, and his remarks must be understood and taken in that sense. He explains his remarks: "So that these various steps are manifestly not jurisdictional, *except* to the *extent* of laying before the court matters which constitute a contempt, and affording to the party accused a fair opportunity of denying or confessing their truth," by stating these facts: "In the present case, the appellant on the return of the rule to show cause filed his affidavit declaring the truth of all the matters alleged in the rule as the basis for its allowance, and although the consideration of the cause was then adjourned from term to term, yet the appellant never intimated that an affidavit should have been presented before the rule was granted, or that he was entitled to have an attachment issue or interrogatories filed, or that the rule should be

discharged for want thereof; and even after sentence was pronounced, he obtained leave to amend his affidavit, but did not *complain of any irregularity or illegality in the proceedings*. Under these circumstances, the objection now made cannot be sustained."

And (on p. 142) the learned justice assigns as a reason for not setting aside the proceedings that the objection came too late.

It is, therefore, at once apparent that the Cheeseman case is no authority for the proposition that the steps to be taken in a procedure for contempt are not jurisdictional, but is rather as authority for the proposition that an alleged contemner may waive such proceedings, by appearing and not objecting.

In the present case, the important facts of which are clearly distinguishable from those in the Cheeseman case in many substantial respects, Verdon objected, from the very start of the initial proceedings against him, to their irregularity and illegality, but was overruled. I vote to dismiss the appeal.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, PARKER, BERGEN, MINTURN, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 8.

For dismissal—KALISCH, J. 1.

90 N. J. L.State v. Jefferson.

THE STATE, DEFENDANT IN ERROR, v. MATTHEW JEFFERSON, PLAINTIFF IN ERROR.

Argued December 1, 1916—Decided July 18, 1917.

1. Courts of impeachment in the United States perform no punitive function. The single purpose of their existence is the protection of the people against public servants who have betrayed their trust and have violated the law which they were sworn to obey.
2. A judgment of conviction, in impeachment proceedings, under article 6, section 3, of the state constitution, is not a condition precedent to the indictment of a prosecutor of the pleas for malfeasance in office and punishment thereunder.

On error to the Supreme Court, whose opinion is reported in 88 N. J. L. 447.

For the plaintiff in error, *Howard L. Miller* and *Clarence L. Cole*.

For the state, *Josiah Stryker* and *John W. Wescott*, attorney-general.

The opinion of the court was delivered by

GUMMERE, CHIEF JUSTICE. The judgment brought up by the present writ is one affirming a conviction of the plaintiff in error in the Cape May Quarter Sessions upon an indictment charging him with malfeasance in office. The office held by him was that of prosecutor of the pleas of the county, and the specific malfeasance charged against him was the protection of violators of the criminal law and affording them immunity from punishment for a money consideration.

Numerous assignments of error were submitted to the Supreme Court, and received consideration by that tribunal in the opinion promulgated by it. The same grounds of attack upon the conviction which were there made have been re-

*State v. Jefferson.**90 N. J. L.*

peated before us. With a single exception, we are content with the disposition made of them by that court and for the reasons set out in the opinion.

The only assignment which we consider merits further discussion is that directed at the refusal of the trial court to grant a motion in arrest of judgment, which was based upon the ground that the plaintiff in error, being a state officer, could not be legally indicted and tried for malfeasance in office until after impeachment proceedings had been instituted against him and a judgment of conviction rendered therein. The argument is, that this is a right afforded to him by article 6, section 3, paragraph 3 of our constitution, which declares that "judgment in cases of impeachment shall not extend farther than to removal from office, and to disqualification to hold and enjoy any office of honor, profit or trust under this state; but the party convicted shall nevertheless be liable to indictment, trial and punishment according to law."

A consideration of the English cases is not helpful in solving the question presented, for the reason that the courts of impeachment of this country, both federal and state, although modeled upon the English tribunal, so far as its formation and methods of procedure are concerned, differ from it fundamentally in the purpose of their existence and the power exercised by them. Stated specifically, the jurisdiction of the English court is purely criminal, inflicting punishment of the same kind and in the same measure as the ordinary criminal courts of the kingdom. (For instance, Lord Stafford, after an indictment for high treason had been presented against him, and before trial thereon, was proceeded against by articles of impeachment for the same offence, was convicted by the house of lords, sentenced to death on the conviction and executed. 7 *How. St. Tr.* 1297. So, too, after the rebellion of 1745 some of the participants therein were indicted and convicted in the common law courts and executed on such convictions, while articles of impeachment were exhibited against at least one of the other partici-

90 N. J. L.State v. Jefferson.

pants, and the trial thereon resulted in his conviction and execution. *Campbell's Life of Lord Hardwick*, p. 106.) The courts of impeachment of this country, on the other hand, perform no punitive function. The single purpose of their existence is the protection of the people against public servants who have betrayed their trust and have violated the law which they were sworn to obey. The sentence pronounced against the offender affects neither his life, liberty nor property, but merely removes him from the office he has disgraced and bars him from ever afterward holding any office of honor, trust or profit.

From what has been said it is apparent that the constitutional provision appealed to by the plaintiff in error was not adopted from any rule of procedure prevailing in England. So far as my examination has gone, it first appears in the New York constitution of 1777, and next in that adopted by New Hampshire in 1784. It was written into the federal constitution in 1787, and after that from time to time was adopted as part of the fundamental contract of at least seventeen of our sister states. Its purpose must be either that claimed for it on behalf of the plaintiff in error or else to settle beyond controversy the claimed right of a person convicted by a court of impeachment to plead that conviction as a bar to a trial on an indictment for the same offence which brought about his removal from office.

So far as the researches of counsel and of the court have gone, but one case has been found in which a contention similar to that advanced by the plaintiff in error has been made, viz., *Commonwealth v. Rowe*, 112 Ky. 482; 66 S. W. Rep. 29. In that case the Supreme Court of Kentucky, after a full consideration of the question, reached the conclusion that the impeachment of a commonwealth's attorney is not a condition precedent to his indictment for malfeasance in office and punishment thereunder. The opinion is a carefully-considered one, and the conclusion reached seems to be fully supported by the logic of the argument set out in it. But, independent of the reasoning of the case cited, we are

State v. Jefferson.

90 N. J. L.

entirely satisfied that the conclusion of the Kentucky court is the correct one. If it be true that the effect of the constitutional provision is to stay proceedings in the criminal courts until after a conviction in the court of impeachment, then punishment for crime in such a case is made to depend upon whether or not the house of assembly will see fit to present articles of impeachment against the offending office-holders. This it may or may not do, as the judgment of its members may dictate. It may be that the offender's term of office will have expired during the recess of the legislature or will expire almost immediately after its convening, and that impeachment proceedings therefore will be inadvisable. Other reasons for non-action by the house of assembly will readily suggest themselves. That any such possible immunity from punishment was intended to be conferred upon betrayers of public trust by the framers of this provision of the constitution cannot be conceded and never has been so understood by our people. The history of our own state is a demonstration of this fact. From 1784, when Peter Hopkins, a justice of the peace, was impeached by the house of assembly, down to the present time, there have been just four impeachment trials in New Jersey. Certainly, no one will suppose that during this period of one hundred and thirty-three years the four persons thus proceeded against constitute all of the office-holders under the state government who have been untrue to the trust reposed in them. In fact, the very slightest examination of our official reports will demonstrate the contrary.

The history of the federal court of impeachment is similar. The records of the senate show that from the adoption of the constitution, in 1787, until now, articles of impeachment have been presented against one president, one United States senator, one member of the cabinet and six members of the judiciary. All other civil officers serving under the federal government who have been guilty of criminal conduct while in office have been dealt with by the ordinary tribunals of justice.

90 N. J. L.

State v. Jefferson.

The records of our sister states have not been available to us for inspection, but it is more than probable that they will disclose a similar condition; for, as was said by Professor Theodore W. Dwight, in an article on "*Trial by Impeachment*" (6 *Am. L. Reg. (N. S.)* 257): "This mode of trial is rarely exercised and practically dormant."

It has been suggested, rather than argued, that unless the indictment of a state officer is postponed until the termination of impeachment proceedings, the interests of the state will suffer by its deprivation of the services of the officer while the title to the office remains in him. This suggestion, when applied to the present case, would seem to savor of grim humor, if it were not for the seriousness of the matter. When it is remembered that the specific charge upon which the plaintiff in error was convicted was the shielding of violators of the criminal law from punishment for a pecuniary consideration, the suggestion that by his conviction and sentence the state is being "deprived of his services" is very wide of the mark; it would be much more accurate to say that by it the state is being protected against the further prostitution of his office.

We conclude that the refusal of the motion in arrest of judgment was proper, and that on the whole case the conviction should be affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

BERT DALY, APPELLANT, v. PIERRE P. GARVEN, RESPONDENT.

Argued March 21, 1917—Decided June 18, 1917.

1. The provision of the act of April 7th, 1914, commonly known as the Preferential Voting act (*Pamph. L.*, p. 170) that "all ballots shall be void which do not contain first choice votes for as many candidates as there are offices to be filled," is not separable from the other provisions of the statute so that it may be rejected and the residue of the statute be permitted to stand; hence, if such provision be unconstitutional the act as a whole fails and an election held under its terms is incapable of conferring a *de jure* title to a private relator under section 4 of the *Quo Warranto* act.
2. In *quo warranto*, when a defeated candidate for an elective office, in order to obtain a judicial determination that he received a plurality of the ballots cast at such election, seeks a decision as to the unconstitutionality of the statute under which the election was held, which is fatal to his *de jure* title to the office, the court, in view of the futility of deciding the question, will decline to pass upon it.

On appeal from the Supreme Court.

For the appellant, *Elmer W. Demarest*.

For the respondent, *Gilbert Collins*.

The opinion of the court was delivered by

GARRISON, J. This appeal brings up for review a judgment of the Supreme Court in favor of the defendant in *quo warranto* entered upon a *postea* certifying the result of a trial before the Circuit Court of Hudson county. The parties were candidates for the office of commissioner of the city of Bayonne under the act of 1911, commonly known as the Walsh act. *Pamph. L.*, p. 462. Five commissioners were to be elected. The election was held under the supplement of 1914, commonly known as the Preferential Voting act (*Pamph. L.*, p. 170), the pertinent provision of which is

90 N. J. L.

Daly v. Garven.

that "All ballots shall be void which do not contain first choice votes for as many candidates as there are offices to be filled," which was brought to the attention of the voters by a direction on the ballot, viz., "If more than one office is to be filled, vote as many first choices as there are offices to be elected or the ballot will be void."

More than nine thousand ballots were cast in compliance with this statutory provision, and counted for the respective candidates. The canvass of the votes so counted showed the election of Garven, the defendant, over Daly, the relator, by less than a score of votes. In making this canvass one hundred and ninety-two ballots were rejected for the reason that they did not contain first choice votes for five candidates for the office of commissioner. If these ballots had been counted they would change the result by giving the relator a plurality over the defendant. The relator, deeming the provision of the statute which required the rejection of these one hundred and ninety-two ballots to be unconstitutional, and believing that he was lawfully entitled to the office in question, filed his information in the nature of a *quo warranto* under the fourth section of the *Quo Warranto* act, in which he set forth the foregoing facts in detail, concluding with the charge that the said relator by virtue of said election was lawfully elected one of the commissioners of the said city of Bayonne, and is entitled to said office which the said Pierre P. Garven hath usurped to the exclusion of said Bert Daly. Issue was joined, and upon the trial at *nisi prius*, Judge Speer, sitting by consent without a jury, held that the act of 1914 was not unconstitutional, which decision justified the rejection of the one hundred and ninety-two ballots on which the relator's claim to the office rested, and this is the trial error that is laid as the ground for the reversal of the judgment of the court below.

It is the contention of the appellant that the act of 1914 is unconstitutional for the reason that it places a compulsion upon all electors to vote a first choice for as many candidates for commissioner as there were offices to be filled. His argument is that this provision may operate to shut off voters

from the ballot box and hence must fall before the constitutional guaranty of the right to vote, citing *Ransom v. Black*, 54 N. J. L. 446. The following quotation from the brief of counsel for the appellant illustrates his argument: "It might very well happen in a given case that there were only five candidates for five offices. Two of them, perhaps, might be totally unfitted to fill the office. Yet, in order to cast a vote for the fit persons, the voter is compelled to vote for persons who should not be trusted with the administration of public offices."

A still stronger argument is that by being compelled to vote for other candidates in addition to voting for those who are his real choice, the elector may actually bring about the defeat of the candidates whose election he desires.

The constitutionality of an election law having these possibilities is evidently a debatable question of great interest and importance.

A subsidiary question of vital importance to the appellant's contention is whether this provision, if found to be unconstitutional, may be excised from the statute, leaving its remaining provisions to stand.

We are clearly of opinion that this cannot be done. The occasion for the exercise of this delicate judicial function is carefully stated by Mr. Justice Depue in *Johnson v. State*, 59 N. J. L. 535, 539, in these words: "The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail."

Stated more tersely, the same doctrine is laid down by Mr. Justice Dixon in *Albright v. Sussex County Lake Commission*, 71 N. J. L. 309, as follows: "The general rule with

90 N. J. L.

Daly v. Garven.

regard to the validity of a statutory scheme, some feature of which proves to be unconstitutional, is that, if the objectionable feature be not so important to the legislative design as to warrant the opinion that the scheme would not have been authorized without it, then the residue of the scheme will be upheld; otherwise, the entire scheme will fail."

Tested by either of these *criteria* the provision in question is on the one hand not wholly independent of the other provisions of the act, but on the contrary is intimately connected with them and with the scheme as a whole; while as to its importance, it was evidently inserted under the belief that without it a complete board of commissioners might not be elected, and so the entire scheme of the statute be defeated.

The entire scheme of the statute relates to the holding of an election in which the provision in question is the most striking feature; to eliminate such a feature from a complete legislative program requires an act of legislation. Such a provision may be dropped by a subsequent legislature as the result of experience or because it differs in opinion from its predecessor. *Pamph. L.* 1916, p. 216. That, however, is a totally different thing from a judicial determination that the provision was deemed of little or no importance by the legislature that enacted it.

The provision that is attacked by the appellant is, therefore, not separable from the residue of the statute; hence, if such provision be unconstitutional, the statute is invalid and the election held under it is incapable of affording a *de jure* title to any of the candidates thereat, including the appellant.

True it is, that the respondent and the other *de facto* commissioners might not be directly affected by such a judicial opinion. The appellant, however, has no such *de facto* status; he is a private citizen claiming a *de jure* title to an office by force of an election, which, if his argument be sound, can confer a *de jure* title upon no one. For it must be remembered that the title of the relator as well as that of the respondent is at issue. *Lane v. Otis*, 68 N. J. L. 656.

In the proceeding which the appellant has instituted in his own right against the respondent, the very rights of both

Daly v. Garven.

90 N. J. L.

parties are drawn into question. *Manahan v. Watts*, 64 N. J. L. 464.

This being so, to what end should a court consider and decide a constitutional question, which, if decided as the appellant argues it should be, would be of no avail to him as a suitor? The charge of the information is that the *de facto* tenure of the respondent excludes the appellant from an office to which he has the *de jure* title. If we cannot adjudge the latter, an adjudication of the former would be of no avail to this private relator. If the one hundred and ninety-two ballots on which the title of the appellant rests were improperly rejected because of the compulsory provision of the statute as to first choice under which the election was held, and if such compulsion renders the statute unconstitutional, then the remaining four thousand two hundred and ninety-three votes on which the appellant bases his title were cast under a like compulsion and were for a like reason incapable of affording valid evidence of a *de jure* title.

In fine, if the statute be invalid because of the compulsory feature it brought to bear upon all the electors, it is equally invalid as to those who yielded to such compulsion as it is to those who stood out against it. So that, adopting the appellant's illustration, every one of such four thousand two hundred and ninety-three ballots cast for him may have been so cast because of such compulsion. If this be too extreme, still it is at least true that we have no way of knowing how many ballots were cast for the relator because of the invalid provision of the statute.

To take another illustration from appellant's brief, "In the Bayonne election there were but thirteen candidates. Who can say whether or not voters were not disfranchised by being compelled to vote for at least five or not at all." Look at it as we may, an invalid election cannot invest the appellant with a *de jure* title.

To sum the matter up in a single sentence: In *quo warranto*, when a defeated candidate for an elective office, in order to obtain a judicial determination that he received a plurality of the ballots cast at an election, seeks a decision as to

90 N. J. L.

Godfrey v. Freeholders of Atlantic.

the unconstitutionality of the statute under which the election was held, which is fatal to his *de jure* title to the office, the court, in view of the futility of deciding the question, will decline to pass upon it.

The redress sought by the appellant as a private relator has two aspects which are inter-related, viz., that the respondent should be ousted from his office in order that the appellant be installed therein, which would not be effected by a decision that the act of 1914 was unconstitutional.

A decision that cannot affect the litigants before the court ought not to be made, and if it ought not to be made, it need not be considered, especially in view of what was said by this court in *Devlin v. Wilson*, 88 N. J. L. 180.

Having thus reached the conclusion that upon no ground that is available to the appellant is any legal error shown in the action of the court below, the judgment of the Supreme Court is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 10.

For reversal—None.

CARLTON GODFREY ET AL., RESPONDENTS, v. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC ET AL., APPELLANTS.

Argued March 20, 1917—Decided April 27, 1917.

Chapter 122 of the laws of 1914 (*Pamph. L.*, p. 203) is not a grant of power to reconstruct county roads in the broad sense of the term "reconstruction," but is limited to the "reconstruction contemplated under the provisions of an act entitled 'An act to provide for the permanent improvement and maintenance of public roads in this state (Revision of 1912), approved April 15th, 1912.'" *Pamph. L.*, p. 809.

Godfrey v. Freeholders of Atlantic.

90 N. J. L.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 511.

For the appellants, *Emerson L. Richards* and *Louis Hood* (*Riker & Riker* on the brief).

For the respondents, *Theodore W. Schimpf* and *Clarence L. Cole*.

The opinion of the court was delivered by

GARRISON, J. The facts of this case are fully stated in the opinion of Mr. Justice Black, who set aside the award of a contract for the improvement of certain public roads. *Godfrey v. Chosen Freeholders*, 89 N. J. L. 511.

We agree that the contract was not legally awarded, but find it unnecessary to lay down any rule as to conditional awards generally.

In the present case, the conditional award made on November 8th, 1916, was by its own terms rendered void by the election to which it referred. There was, therefore, on November 24th, 1916, no award and no power to make one, since the meeting held on that date was not an adjourned meeting or one to which the matter had been continued; moreover, all bids but one had been rejected and none of the statutory safeguards thrown around the awarding of such a contract was or could have been complied with. The award made at that meeting had not even the semblance of legality. Our affirmance of the judgment of the Supreme Court might well rest upon this ground alone, were it not for the fact that there is a more fundamental question that has been fully argued by counsel and that ought, in the interests of the public, to be decided before any further action is taken by the board of chosen freeholders under chapter 122 of the laws of 1914, which, admittedly, is the authority upon which the right to make the proposed improvement rests. That statute is not a grant of power to reconstruct county roads in the broad sense of the term "reconstruction," nor does it leave it

90 N. J. L.Godfrey v. Freeholders of Atlantic.

to the courts to give such broad meaning to it. The statute itself defines the word by limiting it to the "reconstruction contemplated under the provisions of an act entitled 'An act to provide for the permanent improvement and maintenance of public roads in this state (Revision of 1912), approved April 15th, 1912.'" We are thrown back, therefore, upon the act of 1912 in order to ascertain the sense in which the word "reconstruction" is used in that act, and when such sense is ascertained such meaning and none other must be given to it in the act of 1914. Turning, then, to the act of 1912, we find it to be a revision of the Public Roads act dealing, as its title imports, with the permanent improvement of public roads and their maintenance. The improvement of a public road is described generally by the act to be its construction as a macadamized, telford, stone, gravel or other sort of road; and the maintenance of such an improved road includes a provision for any extraordinary repairs or reconstruction of which such road may be in need.

This is the sort of reconstruction that is contemplated by the act of 1912, a reconstruction that is, upon the one hand, closely associated with the idea of repairs, and upon the other, sharply contrasted with the idea of construction. So, that upon comparing the provisions of that act with the provisions of the present contract, the latter could by no stretch of the imagination be brought within the provision for reconstruction of the act of 1912.

This being so, it follows imperatively that such contract provisions cannot be brought within the authority to reconstruct granted by the act of 1914, which in express terms applies to such reconstruction only as was contemplated by the act of 1912.

The award of the contract, therefore, was not only invalid because not legally made, but also because the board of chosen freeholders were without authority to make the proposed improvement.

The judgment of the Supreme Court is affirmed.

Jersey City v. Thorpe.

90 N. J. L.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—None.

THE MAYOR AND ALDERMEN OF JERSEY CITY, RESPOND-
ENT, v. HERBERT A. THORPE, APPELLANT.

Argued March 15, 1917—Decided June 18, 1917.

Writs of error do not run directly to this court from the order of a justice of the Supreme Court reviewing the summary convictions of criminal courts in municipalities.

On appeal from the Supreme Court.

For the appellant, *Frank W. Heilenday*.

For the respondent, *John Bentley*.

The opinion of the court was delivered by

GARRISON, J. The appellant was convicted by the First Criminal Court of Jersey City of a violation of the provisions of section 4 of an ordinance entitled "An ordinance concerning the littering of the streets with refuse matter," in that the said appellant did distribute hand circulars upon Summit avenue, in said city.

Having been thus convicted, the appellant made application to the justice holding the circuit of the Supreme Court in Hudson county for the purpose of having his said conviction set aside, if found to be illegal, as provided by the act establishing criminal courts in municipalities in counties of the first class.

90 N. J. L.

Jersey City v. Thorpe.

The said justice having heard said appeal, "under the statute in such case made and provided," ordered that the conviction of the said appellant be affirmed. This order the appellant seeks to bring before this court by an appeal.

It is too plain for argument that such an appeal is without legal foundation, not only for the reason that an appeal has not been substituted for a writ of error in the review of the judgments of courts of criminal jurisdiction, but for the more substantial reason that a writ of error does not run directly to this court from the orders or judgments of a legislative agency such as the justice of the Supreme Court is under the provisions of the statute under which the proceedings below were had.

Certiorari is the proper remedy; the constitutionality of the statutory review by a legislative agency is sustainable solely upon the ground that orders or judgments so made may be supervised by the Supreme Court upon *certiorari*. *Newark v. Kazinski*, 86 N. J. L. 59.

The present appeal, therefore, brings nothing before this court and must consequently be dismissed.

It may be well to point out to counsel for the appellant that he has no right to argue in an appellate court constitutional questions based upon a stipulation entered into for the purposes of such appeal, and raising for the first time in the appellate tribunal questions that were not raised in the court below. *N. J. Dig. (Appeal and Error)*, § 91 *et seq.*; *State v. Shupe*, 88 N. J. L. 610.

Ross v. Freeholders of Hudson.90 N. J. L.

JOHN ROSS, APPELLANT, v. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, RESPONDENT.

Submitted March 30, 1917—Decided October 11, 1917.

Plaintiff, who held a position in the county jail under the provisions of the Civil Service law, having been dismissed by the sheriff in violation of such provisions, brought his suit for damages against the board of chosen freeholders and was denied recovery upon the doctrine of *Stuhr v. Curran*, 44 N. J. L. 181. *Held*, that as the relation between plaintiff and defendant was contractual in character, it was error to apply to it a doctrine that applied only to those who were part of a governmental department, to wit, officers, and not to those employed by such department. *Held also*, that the relation of the parties bound the defendant to the observance of the pertinent provisions of the Civil Service law, and that such implied contract was broken by the defendant when the sheriff as its agent dismissed the plaintiff in violation of such provisions.

On appeal from the Supreme Court.

The following decision was rendered by the Circuit Judge:

"This case is, by consent, tried before me without a jury on a stipulated state of facts.

"Plaintiff was employed as a guard in the Hudson county jail. His employment was under and subject to the Civil Service laws of the State of New Jersey. The sheriff of Hudson county dismissed plaintiff from his position without alleging any reason, without a hearing, and contrary to law. The state civil service commission refused to sustain the sheriff's said action on the ground that it was improper and illegal and held that the plaintiff should be permitted to perform his duties as such guard, and plaintiff thereupon was allowed to perform his duties. It is stipulated that plaintiff's dismissal was contrary to law, and that he duly and regularly reported for work, and was at all times ready and willing to

perform the duties of his said employment, but that he did not perform the same. It is also stipulated that plaintiff was prevented by the then sheriff of Hudson county from rendering any services as such guard in said Hudson county jail from November 30th, 1911, up to March 19th, 1913, for which period he sues herein to recover his salary.

"There is no question made by either side but that a guard in a county jail holds a position (*Cavanagh v. Essex County*, 58 N. J. L. 531); nor is there any doubt that 'a position is analogous to an office, in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties *may* be non-governmental and not assigned to it by any public law of the state.' *Fredericks v. Board of Health*, 82 *Id.* 200. There is no doubt either but that one who becomes a public officer *de facto* without dishonesty or fraud on his part, and who renders the services required of such public officer, may recover the compensation provided by law for such services during the period of their rendition. *Erwin v. Jersey City*, 60 *Id.* 141. It follows that he, the *de facto* officer, is entitled to the compensation. *Ibid.* 150. It was decided in that case that the *de facto* officer, who actually performed the services, was entitled to the compensation, and that the *de jure* officer who had not performed them was not entitled to it. This conclusion is abundantly supported by the cases of *Stuhr v. Curran*, 44 *Id.* 181; *Uffert v. Vogt*, 65 *Id.* 377, and *Hoboken v. Gear*, 27 *Id.* 265, 278.

"The question for decision in this case is whether the cases above cited are applicable to the case now *sub judice* or whether the case of John Boylan, appellee, *v. Mayor and Aldermen of Jersey City*, submitted March 25th, 1914, and decided June 23d, 1914, by the New Jersey Supreme Court, is applicable. The opinion in the latter case, which is short, was as follows:

"*Per curiam*: The appellee was employed in the street department of Jersey City at \$65 a month. On August 17th, 1912, he was suspended and later was tried and dismissed. On appeal the civil service commission adjudged that he was

Ross v. Freeholders of Hudson.90 N. J. L.

illegally dismissed and ordered his reinstatement; and on January 1st, 1913, he was in fact reinstated. This suit is for \$65 a month from August 17th, 1912, to January 1st, 1913, less what the appellee was able to earn. Judgment was given for appellee for the amount claimed. This was right. It is not the case of an office or position, but of a mere employment. *Fredericks v. Board of Health, supra*. The action was based on an unlawful discharge. If there had been a contract for a fixed term, say one year, judgment would unquestionably be founded on a sound legal principle. In our opinion the tenure of office created by the legislative policy of the Civil Service act takes in legal theory the place of such contract, and hence by analogy the discharged employe when reinstated by the civil service commission recovers upon the principle of an unlawful discharge, in which action under the civil service rule the technical difference between damages and wages does not arise. If this is not so, a mere suspension, however unlawful, will accomplish all that a lawful dismissal could and the civil service be thereby entirely emasculated.

“The judgment of the First District Court of Jersey City will be affirmed.”

“I think that the cases first cited, notably that of *Erwin v. Jersey City* and *Stuhr v. Curran*, are applicable, and that the case of *Boylan v. Jersey City* is inapplicable. It must not be overlooked that the court in pronouncing the opinion in *Boylan v. Jersey City* took particular pains to differentiate that case from one in which the case of an office or position was in question and planted its decision firmly upon the ground that the case then before it was one of mere employment, thereby indicating that if the case had been one of office or position the result would in all likelihood have been different. Further, it cannot be denied that if the case were one of office the defendant is entitled to prevail, and it seems to me that the analogy between an office and a position pointed out in *Fredericks v. Board of Health, supra*, and the fact that in this case the employment of the plaintiff was, in the light of the decisions, and by the nature of plaintiff's

90 N. J. L.

Ross v. Freeholders of Hudson.

duties and functions, and the source from which they emanated, of such a character as to make the analogy between it and an office too close to be overlooked or to work any difference in the adjudication that should be made in the case in hand.

"The above results in my finding in favor of the defendant and against the plaintiff in the present action."

For the appellant, *Charles M. Egan*.

For the respondent, *James J. Murphy*.

The opinion of the court was delivered by

GARRISON, J. The court below, having rightly decided that the plaintiff held a position, and not an office, erred in denying his cause of action upon the doctrine of *Stuhr v. Curran*, which is applicable solely to an office and not at all to a position. The analogy which was supposed to justify the extension of this doctrine to the holder of a position is limited to certain of the qualities appertaining to the duties of both an office and a position, viz., their permanence and certainty; but, as was pointed out in *Fredericks v. Board of Health*, all analogy is lacking with respect to the obligation to perform such duties as are non-governmental, which is precisely the ground upon which the doctrine of *Stuhr v. Curran* is founded. No analogy can bridge the distinction established by that case between an office and a position or any other form of public employment. Every person engaged in the civil service is either part of a governmental system or he is employed to forward the work of such system; if the former, he is an officer to whom the doctrine of *Stuhr v. Curran* applies; if the latter, he is an employe to whom such doctrine does not apply.

The division of such employes into those holding positions and those having a mere employment, is one of convenience only, which, having been adopted by the legislature, has called forth judicial definition, but, generically, and for the appli-

Ross v. Freeholders of Hudson.

90 N. J. L.

cation of judicial doctrines, there are but the two classes mentioned, viz., those who are part of the government and those who are employed by it. Between these two one of the fundamental differences declared by the decision, in *Stuhr v. Curran*, is that as to the former all idea of a contract is excluded, whereas an employment, whatever may be its grade, connotes in some form the contractual relation of master and servant. A test, therefore, of the applicability of the doctrine of *Stuhr v. Curran*, is whether the relation of the parties is in legal contemplation that of master and servant; if it is, the doctrine peculiar to offices cannot be applied to it.

Now, it is settled law that the appointment of the plaintiff as a guard in the Hudson county jail by the then sheriff created between the plaintiff and the defendant, the board of chosen freeholders, the relation of master and servant. *Sullivan v. McOsker*, 84 N. J. L. 380.

The position involved in that case was that of jail warden, and the crucial question was whether or not the appointment by the sheriff constituted such appointee an employe of the county, the Supreme Court having held, following the case of *Kelly v. Arbuckle*, 78 N. J. L. 94, that the appointment by the sheriff did not have that effect. *Sullivan v. McOsker*, 83 *Id.* 16.

In reversing this decision of the Supreme Court, this court, speaking through Mr. Justice Kalisch, said:

"As soon as the sheriff selects and employs assistants they become the servants of that municipality for whom the sheriff is acting as the agent."

It being thus settled in this court that a contractual relation existed between the plaintiff and the defendant, it follows necessarily that it was error to apply to such a relation the doctrine of *Stuhr v. Curran*, from which all idea of a contractual relation is excluded.

This disposes of the main question argued upon the present appeal, but, inasmuch as the case cited also disposes of certain subsidiary questions, two further excerpts from the opinion in that case will be quoted: "The fact that the county pays the warden for such services out of the county funds makes

90 N. J. L.

Ross v. Freeholders of Hudson.

him an employe in the service of the county, and *therefore within the protection of the Civil Service law.*

"It must be borne in mind that the object of the legislature was to secure by means of the Civil Service law efficient public service in the state institutions and in the governmental departments of this state. Therefore, in applying this statute to any particular given case *the court must above all recognize and enforce the broad public policy which underlies it.*"

This means that in the given case before us the observance by the defendant of the provisions of the Civil Service law must be read into its contract with the plaintiff, and that for a breach of the contract thus constructed the defendant may be held liable for damages. *Boylan v. Jersey City.*

That the dismissal of the plaintiff by the sheriff in violation of the Civil Service act constituted such a breach is the necessary corollary of the decision that the acts of the sheriff within his delegated authority as agent for the board of freeholders are binding upon the board of freeholders. Apart from the decided case this must be so upon general principles, since there is no question that the legislature made the sheriff the agent of the county in these respects, and there can be no question that in dealing with its governmental agencies the legislature may by general laws distribute authority among them and impute the responsibility for its exercise as it sees fit.

The case cited also puts at rest any question, if there can be any, arising from the circumstance that when the plaintiff in the present case was dismissed in 1911, the law as then declared by the Supreme Court in the Arbuckle case imposed no liability therefor upon the county. For the decision in the case cited was made not only in the face of the Arbuckle case, but also in the face of the concrete decision of the Supreme Court in that very case itself. To judicial decisions thus reversing judgments previously rendered or overruling older decisions, the rule of legislative enactments has no application. What a court declares to be the law always was the law, notwithstanding earlier decisions to the contrary.

Ross v. Freeholders of Hudson.90 N. J. L.

Such earlier decisions may indeed be cited elsewhere than in a court of justice in extenuation of unlawful acts that were apparently lawful at the time of their commission, but such considerations have no place in judicial determinations as to the legal liability for such acts with which alone we are now concerned.

From this it follows that the fact that the defendant relying upon judicial decisions paid for the services rendered by the person whom the sheriff put in the position from which he had unlawfully dismissed the plaintiff has no greater legal significance than similar payments would have if made by an individual or by a private business concern under like circumstances. For the hardships arising from the mistakes of courts the law has never undertaken to provide a remedy or to afford redress.

The question of damages was not reached in the court below, and hence is not raised on this appeal. The case must be retried upon the unlawful discharge theory under the rules as to the measure and mitigation of damages appropriate to that branch of the law of contracts.

The judgment of the Supreme Court is reversed and a *venire de novo* awarded.

For affirmance—THE CHIEF JUSTICE, WHITE, TAYLOR, JJ. 3.

For reversal—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 12.

90 N. J. L.

Armbrecht v. D.; L. & W. R. R. Co.

AUGUSTA ARMBRECHT, ADMINISTRATRIX, RESPONDENT,
v. THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY, APPELLANT.

Argued March 19, 1917—Decided June 18, 1917.

In an action under the Federal Employers' Liability act, it was open to the jury to infer from the evidence that the plaintiff's intestate was engaged in removing snow from the tracks, both interstate and intrastate, of a railway; that the work had been only temporarily suspended; that the men were told by the boss to go in a covered car as it was raining and freezing at the time; that to do so, they walked along the tracks because they couldn't go otherwise, and decedent was struck and killed by a fast passenger train considerably behind time; that there was a failure to warn him that the passenger train was behind time and might be expected. *Held*, that it was for the jury to say whether the decedent was engaged in interstate commerce, whether there was negligence on the part of the railway company, and whether the decedent had assumed the risk.

On appeal from the Hudson Circuit.

For the appellant, *Maximilian M. Stallman* (*Frederic B. Scott* on the brief).

For the respondent, *Alexander Simpson*.

The opinion of the court was delivered by

SWAYZE, J. This is an action under the Federal Employers' Liability act. There was evidence from which the jury might infer that the deceased was engaged in removing snow from the tracks, both intrastate and interstate, at the Port Morris yard; that after working for some time it became necessary to back the work train east some four miles to Chester Junction for the purpose of getting back to the Port Morris yard on the westbound tracks; that more snow was to be removed; that the train was held some minutes at Chester Junction; that the men were told by the "boss" to go in the covered car as it was raining and freezing at the time;

Armbrecht v. D., L. & W. R. R. Co.90 N. J. L.

that to do so, they walked along the tracks because they couldn't go otherwise; that a fast passenger train came along considerably behind time, struck the men on the track and killed plaintiff's intestate; that there was no warning that it was behind time and might be expected.

The trial judge left it to the jury to say whether the deceased was engaged in interstate commerce and whether there was negligence on the part of the defendant. We think the evidence required him to take this course. The fact that there was a temporary cessation in the work of removing snow, and a temporary rest from work, did not require a finding that the decedent at the moment of the accident was not engaged in interstate commerce; nor do we think that the fact that he was about to take refuge from the storm in the covered car makes any difference. That was a mere incident of the employment which did not thereby change its general character. The work was the removal of snow from railway tracks, interstate as well as intrastate; it had merely suffered a temporary interruption due to the necessities of traffic on a busy railway, and in some degree to the inclemency of the weather. It is enough to refer to *New York Central Railroad v. Carr*, 238 U. S. 260, and to *Shanks v. Delaware, Lackawanna and Western Railroad*, 239 Id. 556, as showing the line of cleavage between the cases. Other cases are cited in the opinion in the *Shanks* case. What we have said is enough to distinguish the present case from *Minneapolis and St. Louis Railroad Co. v. Winters*, 242 Id. 353, and to bring it within the principle of *Louisville and Nashville Railroad Co. v. Parker*, Id. 13. Other recent cases on one side or the other of the line are *Erie Railroad Co. v. Welsh*, Id. 303; *Illinois Central Railroad Co. v. Peery*, Id. 292.

The question of negligence is more difficult. The failure of the engineer of the passenger train to blow a whistle until too late for any good does not indicate negligence, since he could not be supposed to anticipate that men would be walking on the track at that point. But we think the failure to warn the men that the passenger train was behind time and

90 N. J. L.Hamilton Twp. v. Mercer Co. Trac. Co.

might be expected, is sufficient to sustain the verdict, since the jury might have believed the evidence that the boss told the men to go to the covered car and that there was no way to go except along the track. This disposes also of the question of the assumption of risk. No doubt a railroad employe, or anyone else, assumes the risk of walking on the track, but it does not follow that he assumes the risk of being struck by a train which he may well think had gone by. The request to charge did not embody all the pertinent facts. We find it difficult to understand what the judge had in mind when he told the jury that they might take into consideration the speed of the passenger train in considering the other charges of negligence, but as he had just charged that the speed of the train did not present a question of negligence, because the company had the right to exercise its judgment in that respect, we think no harm could have been done the defendant by that portion of the charge which is made a ground of appeal.

The judgment is affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

**TOWNSHIP OF HAMILTON, RESPONDENT, v. MERCER
COUNTY TRACTION COMPANY ET AL., APPELLANTS.**

Argued November 28, 1916—Decided September 13, 1917.

1. In order to construct a street railway from terminus to terminus as authorized by the municipal ordinance, it was necessary to cross a steam railroad; the consent of the railroad company to the crossing could not be had and efforts by the street railway company to secure an order of the Chancellor and the approval

Hamilton Twp. v. Mercer Co. Trac. Co.

90 N. J. L.

of the public utility commission were without result. *Held*, that in the absence of a legal right to cross the steam railroad a *mandamus* should not be awarded to compel the construction of the street railway.

2. A municipal ordinance authorized the construction of a street railroad, from terminus to terminus. *Held*, that a *mandamus* should not be awarded to compel its construction in two unconnected sections, separated by a steam railroad, which the street railway had no legal right to cross.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 485.

For the appellants, *George W. Macpherson* and *Frank Bergen*.

For the respondent, *Alvin W. Sykes* and *Linton Satterthwaite*.

The opinion of the court was delivered by

SWAYZE, J. The pleadings in this case as moulded by the Supreme Court consist of an alternative writ of *mandamus*, return and demurrer thereto. The return avers as follows: The Mercer County Traction Company was organized in 1899 under the "Traction act" of 1893; on August 1st, 1904, it leased all its property and franchises, except the franchise to be a corporation, to Trenton Street Railway Company; this lease was canceled October 15th, 1910, and a similar lease made to Trenton and Mercer County Traction Corporation; the township of Hamilton, by ordinance on February 7th, 1906, consented to the construction of a street railway by Mercer County Traction Company on the Allentown, Crosswicks and Trenton turnpike, beginning at the intersection of the turnpike with the boundary between Mercer and Monmouth counties, and thence westerly to a point in Yardville across and one hundred feet from and west of the railroad of the United New Jersey Railroad and Canal Company, said point being the terminus in said turnpike of a street railway owned by said Mercer County Traction Company extending

90 N. J. L. Hamilton Twp. v. Mercer Co. Trac. Co.

from Trenton to Yardville; the proposed street railroad, if constructed on the route prescribed in the ordinance and indicated on a map filed with the secretary of state, would connect with and might be operated in connection with the existing street railway owned and operated by appellants between Trenton and Yardville, and would be in effect a physical extension of the appellants' pre-existing street railway; the ordinance did not authorize the traction company to construct its railway across the tracks of the United New Jersey Railroad and Canal Company, and could have no legal effect until the right to cross the railroad was obtained; the proposed street railway would be of little value unless it could be connected with the railway from Trenton to Yardville, and would not have been undertaken by the appellants; the appellants, and each of them, shortly after the passage and acceptance of the ordinances, endeavored in good faith to negotiate an agreement with the United Railroads and the Pennsylvania Railroad Company, its lessee, for permission to construct street railway tracks across the railroad in order to connect with the Trenton-Yardville tracks; in order that an elevated crossing might be made the appellants purchased land on both sides of the railroad for the purpose of making a detour across the railroad above its grade, but could reach no agreement with the railroad company; appellants filed a bill in chancery for a decree authorizing the construction of the street railway across the tracks of the railroad company, which suit is now pending; in April, 1913, the appellants applied to the board of public utility commissioners for an order authorizing such crossing to be made, but the board adjourned the matter indefinitely and has never made the order. We need not recite other important averments in the return since the case can be decided upon those already set forth. The Supreme Court gave final judgment for the relators and ordered a peremptory *mandamus* requiring the appellants to forthwith complete the construction of the street railway described in the ordinance of February 7th, 1906, from the westerly terminus to North Crosswicks and hence within a reasonable time to the easterly terminus. The judg-

Hamilton Twp. v. Mercer Co. Trac. Co.

90 N. J. L.

ment properly recognized the proposed railway as an entirety from the westerly to the easterly terminus, but permitted it to be built in two sections. It failed, however, to recognize the fact that the construction ordered was impossible since the street railway could not force its way across the tracks of the United Railroad and Canal Company. There can be no duty to be enforced by *mandamus* until there is an absolute legal obligation to do what the writ commands. To constitute such an obligation there must be an absolute right to do what is commanded. In the present case this requires not only the municipal ordinances and the acceptance of them by the street railway, but also either the assent of the railroad company or action by the Court of Chancery and the board of public utility commissioners. *Comp. Stat.*, p. 4235, pl. 32; *Pamph. L.* 1911, p. 383, § 21. The Supreme Court suggested that this contingency was within the contemplation of both parties when the ordinance was passed and accepted. The necessity of obtaining the assent of the railroad company or the decree of the Chancellor must have been within the contemplation of both since they are presumed to know the statute. What effect this knowledge of the parties of a condition necessary to performance resting on the will of a court, and subsequently by legislative enactment the will of a public administrative body, may have upon the obligation of the contract we need not decide.

The prerogative writ of *mandamus* is not used for the enforcement of a mere contract between parties. *Newark v. North Jersey Street Railroad Co.*, 73 N. J. L. 265. It is used only to enforce a public duty which may sometimes grow out of a contract as well as out of a statute. *Wilbur v. Trenton Passenger Railway Co.*, 57 Id. 212; *Bridgeton v. Traction Co.*, 62 Id. 592; *Rutherford v. Hudson River Traction Co.*, 73 Id. 227; *Pleasantville v. Atlantic City Traction Co.*, 75 Id. 279; *Camden v. Public Service Railway Co.*, 82 Id. 246; but there can be no public duty to do what the law, out of considerations of the public safety, forbids. To apply the principle to the present case, there can be no public duty to construct the street railway across the railroad until the

90 N. J. L.

Hamilton Twp. v. Mercer Co. Trac. Co.

statutory requirements are complied with. To hold otherwise would be equivalent to permitting a municipality and a street railway company to override a public statute based on the highest considerations of public safety. If there was a valid agreement between the municipality and the street railway, and that agreement imposed an absolute obligation on the railway company and not an obligation conditional upon the proposed performance being permitted by law (*Poll. Cont.* 405; *Baily v. DeCrespigny, L. R.*, 4 Q. B. 178; *Louisville and Nashville, &c., Railroad Co. v. Mottley*, 219 U. S. 467; *Pom. Cont.*, § 295), the most the municipality could do in case of breach of contract would be to sue the street railway company for damages; but that is a very different remedy from a *mandamus* commanding them to do what the law forbids. Even if the contract required the street railway company to exert its powers to secure the right to cross, the court could at the utmost go no further than to command it to exert its power. In that event, we would be bound to assume that the Chancellor and the public utility commission would act justly in furtherance of the public policy evinced by the statute. We could not control the action of either.

It is suggested that the railway company did not act in good faith; but as good faith is averred in the return and admitted by the demurrer, and as the company in fact initiated proceedings before the Chancellor (still pending), and applied to the board of public utility commissioners and brought the case to hearing, we are unable to see how bad faith can properly be imputed. The Supreme Court assumed that the effort was made in good faith. If that were not so, the Supreme Court still could not, legally, require the street railway company to do something which our statutes forbid. The furthest its writ of *mandamus* could go would be to require the railway company to press to a conclusion the pending proceeding before the Chancellor; it could hardly compel the company to undo the act of the board of public utility commissioners in adjourning the matter indefinitely; and it surely could not dictate to either tribunal what decision to

render. Until a favorable decision is reached, the defendants are under no public duty to build their railway across the railroad tracks.

The Supreme Court realized the difficulty, and to avoid it suggested that if the crossing of the railroad was impossible, the street railway company might still exercise their franchise in behalf of the public without reference to the steam railroad crossing by completing the construction and operating their line on either side thereof. It is enough to say that such is not the judgment entered nor the command of the writ awarded by the court, which commands construction and operation from terminus to terminus. The Supreme Court might indeed amend the judgment when the record is remitted but for the fact that there is an objection which is insuperable. The suggestion of the opinion amounts to changing an obligation to build one street railway into an obligation to build two. It involves the holding that a company which has been incorporated and authorized to build a single and continuous line between fixed termini may be compelled to build two separate lines with different termini. We cannot know the practical effect of such a change. The demurrer admits the averment of the return that such a railroad would be of little value and would not have been undertaken by the respondents. It is enough for us to know that the company has not contracted to build two separate lines and is not authorized by its charter or by the township ordinances to do so. Both the public and the company are interested in having exactly what the charter and the ordinances provide; it is not for the court to give them something which it may think nearly as good. As was said in *Bridgeton v. Traction Co.*, 62 N. J. L. 592 (at p. 600), "it became the duty of the respondent company to operate the railway over its entire route under the franchises as acquired by it." This duty could not be performed by operation over a part of the route only. The company in that case had the right to cross the bridge; it could not have performed its public duty by merely running to the bridge on each side and compelling its passengers to walk across. In this case

90 N. J. L. N. Y. and N. J. Water Co. v. Hendrickson.

the company has no right to cross the railroad, but the securing of that right was within the contemplation of both the municipality and the street railway company; and the line from terminus to terminus cannot be cut in two, and the company absolved by a partial performance of an entire contract.

The judgment must be reversed and the record remitted to the end that judgment be entered for the defendants. The defendants are entitled to costs.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

NEW YORK AND NEW JERSEY WATER COMPANY, APPELLANTS, v. CHARLES E. HENDRICKSON ET AL., STATE BOARD OF ASSESSORS ET AL., RESPONDENTS.

Argued March 7, 1917—Decided June 18, 1917.

Owners of franchises whose business is the sale of their commodities or services, gas, electric current, electric communication, steam or water, with whom the means of transportation—wires or pipes—are only the necessary means of delivering their commodities, are not transportation companies under section 4 of the Voorhees Franchise Tax act of 1900 as amended (*Comp. Stat.*, p. 5299, pl. 530), and, consequently, are taxable under section 5 of that act (*Comp. Stat.*, p. 5299, pl. 531) on the whole of their gross receipts, irrespective of whether such receipts are from the sale of commodities or for its mere transportation.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 595.

N. Y. and N. J. Water Co. v. Hendrickson. 90 N. J. L.

For the appellants, *Franklin W. Fort.*

For the respondents, *Herbert Boggs*, assistant attorney-general.

The opinion of the court was delivered by

SWAYZE, J. One point raised by the appellants seems to require notice. It is argued that the franchise tax on a water company under the act of 1903, amending the Voorhees Franchise Tax act of 1900 (*Pamph. L.* 1903, p. 232; *Comp. Stat.*, p. 5299), must be calculated only upon the gross receipts for transportation. Hence, it is said, it was erroneous to tax the prosecutor on the whole of its gross receipts, since it owned the water it transported, and to calculate the tax on the whole of the gross receipts was to calculate it, at least in part, on receipts for the sale of water, as distinguished from receipts for its mere transportation. The tax is fixed by section 5 (*Comp. Stat.*, p. 5299, pl. 531) at two per centum of the annual gross receipts "as aforesaid." The reference is to section 4, and the difficulty arises out of the fact that by that section the owner of a franchise is first required to make return of the gross receipts of the business, and later, in the same section, every owner of a franchise having part of its transportation line on private property and part on public streets or places, is required to make return showing the gross receipts for transportation. The appellants assume that a water company is within the last provision. The history of the legislation shows the fallacy of this assumption. The corresponding part of section 4, as originally enacted in 1900 (*Pamph. L.*, p. 503), applied only to oil or pipe line companies having part of their transportation line in this state and part in another state and to their receipts for transportation of oil or petroleum. At that time oil and pipe line companies transporting oil or petroleum having part of their lines in this state and part in another state, were transportation companies called transit companies, and were soon after treated as common carriers by the act of congress known as the Hepburn act. This view has recently

90 N. J. L. N. Y. and N. J. Water Co. v. Hendrickson.

been sustained by the Supreme Court of the United States. *Pipe Line Cases*, 234 U. S. 548.

The legislature, in the act of 1903, dealt with two classes of owners of franchises, one of which was required to make a return of the gross receipts of the business, the other a return of gross receipts for transportation. Probably all owners of franchises affected by the act, *i. e.*, those having the right to use or occupy, and occupying the streets and public places, used the streets for the transportation of their product. Such are the owners of gas plants, electric light plants, telegraph and telephone plants, steam heating plants. If all these are to be dealt with as transportation companies under the later clause, there will be few or none left to make return on the whole of their gross receipts under the earlier clause. What was meant by the later clause was to tax the owners of franchises whose business was transportation, like the New York Transit Company and the National Transit Company. Others whose business was the sale of their commodities or services, gas, electric current, electric communication, steam or water, with whom the means of transportation—wires or pipes—were only the necessary means of delivering their commodities, were taxable on their total gross receipts under the earlier clause. This disposes of the objection to the view of the Supreme Court that the error in apportionment affects only the municipalities and they do not complain. It disposes also of the contention that the apportionment should be made, not according to the length of the line, whether there was one pipe or more, but according to the number of feet of pipe. There is no apportionment necessary in ascertaining the *amount* of the tax, in which alone the appellants are interested. If there has been error in apportioning the amount among the taxing districts, the appellants are not injured thereby.

As to other points raised, we have nothing to add to what was said by the Supreme Court.

We find no error and the judgment is affirmed, with costs.

Christy v. N. Y. Cen. & Hud. Riv. R. R. Co. 90 N. J. L.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—None

CHARLES R. CHRISTY ET AL., RESPONDENTS, v. NEW YORK CENTRAL, AND HUDSON RIVER RAILROAD COMPANY, APPELLANT.

Argued March 16, 1917—Decided June 18, 1917.

1. In a suit brought to recover damages for property destroyed by fire through the failure of the defendant railroad to use reasonable care to keep its right of way in New York State clear of combustible materials, a written statement made by the defendant's general manager (who was charged with the duty of maintenance and care of such right of way), to the public service commission of New York (when it was conducting a legally authorized investigation of the fire) to the effect that, at the time of the fire, the defendant company had not cleared its right of way of combustible materials, was admissible in evidence against the defendant company.
2. The general rule is that when a corporation authorizes an attorney to speak for it, the corporation may be confronted by testimony as to what was said by such attorney within the scope of his authority.
3. Where a railroad company had authorized its attorney to act and speak for it at a legally authorized hearing by the public service commission at which a fire along the company's right of way, and the company's connection therewith, was under investigation, evidence as to such attorney's statements then and there made with respect to combustible matter on such right of way at the time of the fire, are admissible in evidence against the company in a suit involving that issue, subject to the latter's right to disprove, rebut, or explain such statements.
4. The presumption of payment or release arising from lapse of time is not necessarily a conclusive and absolute presumption. The lapse of time gives rise to a conclusive and absolute presumption only when not satisfactorily accounted for or explained. But when so accounted for or explained the delay still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined in connection with the other evidence.

90 N. J. L. Christy v. N. Y. Cen- & Hud. Riv. R. R. Co.

5. When a party asks for an instruction which is partly good and partly bad, it is proper to refuse it altogether.

— — —

On appeal from the Supreme Court.

For the appellant, *Vredenburg, Wall & Carey*.

For the respondents, *Edmund W. Wakelee, Wendell J. Wright and Edward V. Thornall* (of the New York bar).

The opinion of the court was delivered by

TRENCHARD, J. This appeal brings up for review a judgment in favor of the plaintiffs below, entered upon the verdict of a jury, at the Hudson Circuit.

We are of the opinion that the judgment must be affirmed.

The action was brought by the plaintiffs, residents of New Jersey, against the defendant railroad, to recover the value of certain cut and piled timber at Long Lake West, Hamilton county, New York, which was destroyed by fire on September 27th, 1908.

The only questions raised on this appeal are those points reserved in the rule to show cause why a new trial should not be granted, which was discharged.

The first challenges the admission in evidence at the trial of a communication by A. H. Smith, vice president and general manager of the defendant company, dated January 6th, 1909, addressed to the public service commission, second district, State of New York.

The situation was this: At the trial of the present case the main issue was whether or not the defendant company was negligent in the maintenance and care of its right of way in violation of its common duty to exercise reasonable care to keep it clear of combustible matter, by reason of which negligence the plaintiffs sustained the damages sued for.

The plaintiffs introduced evidence tending to show that the right of way of the defendant at and near where the plaintiffs' lumber was piled was filled with combustible materials. The plaintiffs also put in evidence section 72 of the

Christy v. N. Y. Cen. & Hud. Riv. R. R. Co. 90 N. J. L.

General Railroad law of the State of New York which enacts, among other things, that "every railroad company shall, on such parts of its road as passes through forest land or lands subject to fires from any cause, cut and remove from its right of way along such lands, at least twice a year, all grass, brush and other inflammable materials," and also provides that "the public service commission must, upon the request of the forest, fish and game commissioner, and on notice to the railroad company or companies affected, require any railroad company having a railroad running through forest lands in counties containing parts of the forest preserve, to adopt such devices and precautions against setting fire upon its line in such forest lands as the public interest requires."

It was also proven and admitted (1) that part of the forest preserve was in Hamilton county; (2) that after the fire in question the public service commission of the second district of the State of New York, upon the request of the forest, fish and game commissioner, began an investigation into such fire to ascertain what the causes were, and to what extent railroad operations were responsible; (3) that the commission made an order directing the defendant company and others to show cause what precautions were being used by them against setting fires upon their respective lines in forest lands, &c.; (4) that at such hearing the defendant company was represented both by its general attorney and its local attorney, and submitted to the commission a communication, in writing, made by Mr. Smith, the vice president and general manager of the defendant company.

It was evidence of this communication which the defendant contends was error requiring reversal. We think not.

The communication contained a statement from which the inference might properly be drawn that the defendant company, at the time of the fire in question, had not cleared its right of way of combustible materials, and the communication having been made by its general manager, who, it appeared, was charged with the duty of maintenance and care of such right of way, was admissible in evidence against the defendant company. *Halsey v. Lehigh Valley Railroad Co.*, 45 N.

90 N. J. L. Christy v. N. Y. Cen. & Hud. Riv. R. R. Co.

J. L. 26; Agricultural Insurance Co. v. Potts, 55 Id. 158; Carey v. Wolff & Co., 72 Id. 510; Jones v. Mount Holly Water Co., 87 Id. 106.

It is next argued that there should be a reversal because of evidence given of an oral statement made by Martin E. McClary, the local attorney of the defendant, before the public service commission, at the hearing above referred to.

We think there is no merit in this contention.

It satisfactorily appeared at the trial, apart from Mr. McClary's statement, that he was the defendant's local attorney, and was instructed by the defendant company to act and speak for it at the hearing respecting the defendant's relation to the fire in question.

The statement in question was then and there made by him in pursuance of his instructions. It was in amplification of the written statement of Mr. Smith, and was that the condition of the right of way, with respect to combustible matter, was "bad and was one of the causes of the fire."

Now, the general rule is that when a corporation authorizes an attorney to speak for it, the corporation may be confronted by testimony as to what was said by such attorney within the scope of his authority. *Gallagher v. McBride, 66 N. J. L. 360; Huebner v. Erie Railroad Co., 69 Id. 327; King v. Atlantic City Gas Co., 70 Id. 679; Wall v. Hinds, 4 Gray (Mass.) 256; Luther v. Clay, 39 L. R. A. (Ga.) 95.*

And where, as here, the defendant railroad company had authorized its attorney to act and speak for it, at a legally authorized hearing by the public service commission at which the fire in question, and the defendant's connection therewith, was under investigation, evidence as to such attorney's statements then and there made with respect to combustible matter on such right of way at the time of the fire, was admissible in evidence against the company in this suit involving that issue, subject to the latter's right to disprove, rebut or explain such statements.

The last reason urged for reversal is that the trial judge refused to charge as follows:

"Plaintiffs' right of action, if any, having accrued Septem-

Christy v. N. Y. Cen. & Hud. Riv. R. R. Co. 90 N. J. L.

ber 27th, 1908, the law of this state presumes that plaintiffs' demands were paid or released within one year thereafter. This presumption has not been rebutted and the verdict must be for the defendant."

The defendant's contention was, and is, that the plaintiffs, when they invoked the jurisdiction of a court of this state over such a cause of action arising in New York, must accept the limitations which would arise against one prosecuting such a cause of action which arose in this state, and that the courts of New Jersey will presume that such cause of action has been released or settled at the expiration of the period of one-year limitation found in section 58 of our General Railroad act. *Pamph. L. 1903, p. 674*. And since that section only applies to railroads within this state, the defendant filed pleas of payment and release in order to raise that question.

Assuming that the defendant's contention respecting the presumption of payment or release is sound to a certain extent, still the refusal of the instruction was right.

The presumption of payment or release arising from lapse of time is not necessarily a conclusive and absolute presumption. The lapse of time gives rise to a conclusive and absolute presumption only when not satisfactorily accounted for or explained. But when so accounted for or explained, the delay still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined in connection with the other evidence. *Gulick v. Loder*, 13 N. J. L. 68, 71; *Blue v. Everett*, 55 N. J. Eq. 329, and cases there cited.

At the trial, in order to meet the defendant's pleas of payment and release, and to account for and explain the delay of a few days beyond one year from the time of the fire, the plaintiffs proved that they had not been paid and had not released the defendant. They also introduced evidence tending to show that immediately after the fire they put their claim in the hands of their attorney who had many interviews and much correspondence respecting it with the duly-authorized attorney of the defendant; that in the course of these negotiations, and about two weeks before the expiration of one

90 N. J. L.

Eckert v. West Orange.

year from the time of the fire, the defendant's attorney requested the plaintiffs' attorney to delay beginning suit until a day named, which, it appears, was one day beyond the one-year period; that on that day the defendant's attorney informed the plaintiffs' attorney that further negotiations were useless, and within a few days thereafter this suit was begun.

In this state of the proofs the trial judge was bound to, and did, submit the question of payment and release to the jury.

So, too, he was bound to refuse the request to charge.

Even if it be assumed that the first paragraph of the request was proper, clearly the second paragraph, which called for a direction of a verdict for the defendant, was improper. And when a party asks for an instruction which is partly good and partly bad, it is proper to refuse it altogether. *Dederick v. Central Railroad Co.*, 74 N. J. L. 424.

The judgment under review will be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

FRANK G. ECKERT, APPELLANT, v. TOWN OF WEST ORANGE, RESPONDENT.

Submitted March 26, 1917—Decided June 18, 1917.

1. A town has the authority to provide for the collection and disposal of ashes and garbage in either of two ways, but not otherwise—first, it may provide for the doing of the work by the town itself. If it adopts this course, it must do so by ordinance, with all of the formalities necessary to enact a valid ordinance; second, it may make a contract with some one to do the work. But where more than \$500 is to be expended, it has no authority to make a valid contract until it has first publicly advertised for bids, and the contract can then be awarded only to the lowest responsible bidder.

Eckert v. West Orange.

90 N. J. L.

2. Where a town has contracted for the removal of ashes and garbage involving an expenditure of more than \$500, without complying with the provisions of chapter 342 of the laws of 1912 (*Pamph. L.*, p. 593) requiring advertisement for bids and award to the lowest responsible bidder, there can be no recovery on a *quantum meruit* for services rendered under such *ultra vires* contract after the service upon the contractor of the writ of *certiorari* sued out to review the validity of the contract.
3. The law will not permit a recovery on a *quantum meruit* in a suit against a municipality where an express contract would be *ultra vires* because in violation of chapter 342 of the laws of 1912. *Pamph. L.*, p. 593.

On appeal from the Essex County Circuit Court.

For the appellant, *Arthur B. Seymour*.

For the respondent, *Borden D. Whiting* and *Ira C. Moore, Jr.*

The opinion of the court was delivered by

TRENCHARD, J. This is an appeal from a judgment of the Essex County Circuit Court in favor of the defendant in an action brought to recover compensation for collecting and disposing of ashes and garbage in the town of West Orange. The material facts are as follows:

The town council of the town of West Orange passed an ordinance purporting to create the office of town scavenger. This ordinance provided that this so-called officer should collect all ashes and garbage and dispose of the same at a place to be provided by himself. His salary, by an amendment passed May 5th, 1914, was fixed at the rate of \$469.50 a month. This was intended not only to compensate him for his services in supervising the work, but also to reimburse him for his necessary expenses, such as hiring men and providing wagons. Eckert, the plaintiff, was appointed town scavenger under this ordinance.

On July 20th, 1914, a writ of *certiorari* was allowed attacking the ordinance and the appointment of Eckert thereunder and the writ was served upon Eckert July 23d, 1914. One of the grounds of attack was that it violated chapter 342 of the

90 N. J. L.

Eckert v. West Orange.

laws of 1912 (*Pamph. L.*, p. 593) which requires that where an expenditure of more than \$500 is to be incurred for labor, materials, &c., the town council must first publicly advertise for bids and award the contract to the lowest responsible bidder. On August 14th, 1914, the Supreme Court rendered judgment setting aside the ordinance and appointment of all proceedings thereunder. Briefly, the basis of the decision was that the person appointed under an ordinance of this character was not an officer of the town and the services were such as should be regulated by contract.

The plaintiff continued to act as scavenger until September 15th, 1914, thereby serving after service of the writ of *certiorari* upon him, and even after entry of the judgment setting aside the ordinance and his appointment. He was paid in full up to July 31st, 1914, which was one week after the writ of *certiorari* was served upon him. He has not been paid for the work done from August 1st, 1914, to September 15th, 1914. It is to recover compensation for work performed by him during this period that this suit was brought.

We are of the opinion that the judgment for the defendant was right.

The contention that, even though the contract was set aside as illegal, the plaintiff is, nevertheless, entitled to recover on a *quantum meruit*, is not well founded in law.

A municipality is under no legal obligation to take charge of the rubbish or garbage which accumulates upon the properties of the inhabitants thereof. It has authority to do so, however, by virtue of the following acts of the legislature:

A supplement to the Town act of 1895 (*Comp. Stat.*, p. 5533, ¶ 378) provides that "the council shall have power by ordinance to provide for the collection, removal, treatment and disposal of ashes and garbage, and to appropriate and provide for raising money by taxation for the said purposes, or any or either of them."

The Town act of 1895, as amended by *Pamph. L.* 1906, p. 324, provides: "No ordinance or by-law shall be passed by the town council unless the same shall have been introduced at a previous stated meeting, and shall be agreed to by a

Eckert v. West Orange.90 N. J. L.

majority of the members of the council; and no ordinance shall take effect until five days after it shall have been published in the official newspapers of the town, and if there be none, in at least one newspaper published in the county and circulating in the town * * *."

Chapter 56 of the laws of 1914 (*Pamph. L.*, p. 91) provides as follows: "It shall be lawful for the governing body of any incorporated town of this state to enter into and make a contract or contracts, not exceeding the term of five years at a time, with any corporation or individual for the collection and removal of ashes and rubbish, and for the collection, removal and disposal of garbage."

Chapter 342 of the laws of 1912 (*Pamph. L.*, p. 593) provides as follows: "Where and whenever hereafter it shall be lawful and desirable for a public body in any county, city, town, township, borough or village to let contracts or agreements for the doing of any work or for the furnishing of any materials or labor, where the sum to be expended exceeds the sum of five hundred dollars, the action of any such public body entering into such agreement or contract, or giving any order for the doing of any work or for furnishing of any materials or labor, or for any such expenditures, shall be invalid unless such public body shall first publicly advertise for bids therefor, and shall award said contract for the doing of said work or the furnishing of such materials or labor to the lowest responsible bidder; *provided, however*, that said public body may, nevertheless, reject any and all bids."

It thus appears that the town council has authority to provide for the collection and disposal of rubbish and garbage in either of two ways, but not otherwise—first, it may provide for the doing of the work by the town itself. If it adopts this course, it must do so by ordinance, with all of the formalities necessary to enact a valid ordinance; second, it may make a contract with someone to do the work. But, where more than \$500 is to be expended, it has no authority to make a valid contract until it has first publicly advertised for bids, and the contract can then be awarded only to the lowest responsible bidder.

The sections of the Town act, and the acts of 1914 and 1912, above quoted, should be read together in the same manner as this court in *Townsend v. Atlantic City*, 72 N. J. L. 474, decided that the act under which Atlantic City was organized (*Pamph. L.* 1902, p. 284), and the Garbage act (*Pamph. L.* 1902, p. 200), should be read together. The town, therefore, had no power to make the contract in question with the plaintiff without complying substantially with the provisions of the act of 1912, and that, admittedly, it did not do.

Where, as in this case, a town has contracted for the removal of ashes and garbage involving an expenditure of more than \$500, without complying with the provisions of chapter 342 of the laws of 1912 (*Pamph. L.*, p. 593), requiring advertisement for bids and award to the lowest responsible bidder, there can be no recovery on a *quantum meruit* for services rendered under such *ultra vires* contract after the service upon the contractor of the writ of *certiorari* to review the validity of the contract.

This case is different from a suit against a private corporation on a claim arising out of an *ultra vires* contract. The defendant in this case is a municipal corporation. The contract out of which the plaintiff's claim arises is *ultra vires*, not because of the provisions of some private charter, but because it violates the public policy of the state.

The legislature by the act of 1912 provided that all public contracts involving the expenditure of more than \$500, must be publicly advertised and awarded to the lowest bidder. The purpose and importance of this act is too obvious to require comment. The plaintiff is now asking that a contract be implied which this law expressly declares shall be invalid. His claim is for more than \$500. It is for services performed after the granting and service of a writ of *certiorari* to review his express contract with the town, and in large part performed after the Supreme Court had set aside his express contract as illegal. If he can recover on a *quantum meruit* for these services, it would seem that there would be nothing to prevent a town council so disposed from permitting him to

continue indefinitely to act as town scavenger without any express contract and thus evade the provisions of the act of 1912 entirely.

Moreover, the law will not permit recovery on a *quantum meruit* in a suit against a municipality where an express contract would be *ultra vires*. Recovery has frequently been allowed on a *quantum meruit*, where there has been some unimportant irregularity in the proceedings, or an innocent mistake as to some matter of fact. But the law will not raise an implied promise which would, as in this case, be in direct defiance of an act of the legislature. If the plaintiff's contention were correct this law (*Pamph. L.* 1912, p. 593), which applies to all municipalities alike, and represents a definite public policy, could be nullified by proof of the fact that the man had done the work and therefore was entitled to what such work was reasonably worth.

In *Hackettstown v. Swackhammer*, 37 N. J. L. 191, it was held that a note given for an unauthorized loan could not be enforced even though the money borrowed had been expended for municipal purposes. Chief Justice Beasley, in delivering the opinion of the Supreme Court, said (at p. 196): "Nor do I think that it adds anything to the right, to enforce the note in this case, that the money which it represents, and which was borrowed, has been expended in behalf of the corporation for legitimate purposes. The argument on this head was that, as the money had gone for the benefit of the corporation, the law, upon general principles, would compel its repayment. If this is so, then the rejection of an implied power to borrow is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. * * * It is to be noted that it is altogether a fallacy to argue that the law will raise an implied power to repay the money after it has been used. The impediment to such a theory is that the corporation has not the competency to make the promise thus sought to be implied. An express promise, to the effect contended for, would be illegal, and, therefore, clearly, the law will not create one by implication. * * * No one can justly reproach the law for not providing him a

90 N. J. L.

Eckert v. West Orange.

remedy for his own folly or indiscretion. Such folly or indiscretion may have enabled the city officials to create a burden, or may have stimulated them to acts of extravagance, which would not have been otherwise created or done. It is but just that the individual who has occasioned the evil should bear the loss."

In *Hill Dredging Co. v. Ventnor City*, 77 N. J. Eq. 467, it was held that a municipal corporation cannot be bound by an engagement which it had no power to make; and the corporate powers of such a corporation cannot be extended by the doctrine of estoppel.

In *Dallas v. Sea Isle City*, 84 N. J. L. 679, this court said: "Courts are instituted to carry into effect the laws. They cannot become auxiliary to the consummation of violations of law. And so it has been held with practical unanimity in such circumstances, since an express promise to pay is *ultra vires* and unlawful, the law will not raise an implied promise."

See, also, *Bourgeois v. Freeholders of Atlantic*, 82 N. J. L. 82, and cases there collected.

The cases cited by the plaintiff in his brief furnish no support for a recovery in this case. For example, in the *Bourgeois* case, *supra*, the lumber was ordered by an unauthorized agent, but the board of freeholders had authority to buy the lumber and by its acts ratified the purchase.

In *New York, Susquehanna and Western Railroad Co. v. Paterson*, 86 N. J. L. 101, the city had the power to make the contract, although it was not regularly executed.

In *Wentink v. Freeholders*, 66 N. J. L. 65, there was no lack of power to make the contract. There was an innocent mistake for which the plaintiff was not responsible, and as to a matter about which he was not bound to inquire.

In *Klemm v. Newark*, 61 N. J. L. 112, the city was held to have the power to make the contract, as the making of it acted as a suspension of the ordinance which forbade it. See *MacLear v. Newark*, 77 *Id.* 712, 714.

In *Tappam v. Long Branch Commission*, 59 N. J. L. 371, the proceedings were regular on their face and the city was acting within the scope of its chartered power.

Eckert v. West Orange.90 N. J. L.

The case of *Bigelow v. Perth Amboy*, 25 N. J. L. 297, does not appear to be applicable, but in that case the city had the power to purchase the material.

It is true that the work performed by the plaintiff in the case at bar was of a character which the defendant was authorized by law to have done; and it is true that the plaintiff performed the work for the defendant at its request. The plaintiff's difficulty is that the request was *ultra vires* and invalid. While the defendant was authorized to make a contract for this work, its authority was conditional upon its awarding the contract in accordance with the provisions of the statute of 1912. It had not the power either to make or to ratify an express contract in any other manner; and the law will not imply a contract which the parties had not power to make. The plaintiff in this case was a party to a scheme to evade and nullify a well-defined public policy of this state, and his present predicament is a direct result of that scheme. What his motive may have been is immaterial. Under such circumstances, the courts will not aid him by implying a contract which the law expressly forbids, but will leave him where it finds him.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

90 N. J. L.Orlando v. Ferguson & Son.

VITO ORLANDO, RESPONDENT, v. F. FERGUSON & SON,
A CORPORATION, APPELLANT.

Submitted March 25, 1917—Decided October 12, 1917.

1. Under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*), in the case of a partial but permanent loss of the usefulness of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, compensation shall bear such relation to the compensation therein provided for total and permanent disability as the partial but permanent disabilities collectively bear to total and permanent disability.
2. In a case under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*), when the trial judge finds that there was a fifty per cent. loss of the usefulness of each hand, and a ten per cent. loss of the usefulness of one eye, he should then find what percentage of total and permanent disability the combination of fifty per cent. loss of the usefulness of two hands and ten per cent. of one eye make, and should then award as compensation that percentage of four hundred weeks. It is not strictly a mathematical problem. It is not to be solved by adding up the fractional parts, but upon the basis of the percentage of total and permanent disability reasonably found to be produced by the several injuries considered collectively and with due regard to their cumulative effect.

On appeal from the Supreme Court.

For the appellant, *Pierson & Schroeder*.

For the respondent, *LaPorta & Stites*.

The opinion of the court was delivered by

TRENCHARD, J. This is a proceeding under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*) brought before a judge of the Hudson County Common Pleas Court to recover compensation for the petitioner's injuries.

The learned trial judge rendered judgment for the petitioner, and that judgment was affirmed by the Supreme Court.

Orlando v. Ferguson & Son.90 N. J. L.

We are of the opinion that the judgment of the Supreme Court now here for review must be reversed.

We think that sufficient facts were found by the trial court to warrant a judgment for the petitioner, and that there was evidence to support such finding. But we cannot agree that the method used in fixing the amount of compensation awarded was proper.

The petitioner was employed in attending a furnace. A flame shot out severely burning him. The trial judge found that there was a fifty per cent. loss of the usefulness of each hand, and a ten per cent. loss of the usefulness of one eye. He considered the two hands together as fifty per cent. of total and permanent disability and allowed therefor two hundred weeks (fifty per cent. of the four hundred weeks allowed by the statute for total and permanent disability), and allowed additional compensation of ten per cent. of one hundred weeks for the injury to the eye, making a total of two hundred and ten weeks.

We think that such method of fixing compensation was wrong.

Paragraph 11 of section 2 of the Workmen's Compensation act (*Pamph. L. 1913, p. 302*) divides injuries into three classes—those producing (a) temporary disability; (b) total and permanent disability, and (c) partial but permanent disability. Subject to certain limitations and provisos not affecting this case, it enacts a schedule of compensation for each class of injuries as follows:

(a) Temporary disability, fifty per cent. of wages during disability not beyond three hundred weeks.

(b) Total and permanent disability, fifty per cent. of wages not beyond four hundred weeks.

(c) Partial but permanent disability, according to a schedule set forth, based upon the extent of the disability, in which are included these—for loss of a hand, fifty per cent. of wages during one hundred and fifty weeks; for loss of an eye, fifty per cent. of wages during one hundred weeks.

The paragraph then continues:

90 N. J. L.Orlando v. Ferguson & Son.

"The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b)."

It then adds:

"In all other cases in this class, or where the usefulness of a member, or any physical function, is permanently impaired, the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule."

Now, the trial judge avowedly undertook to apply the principle underlying the case of *Vishney v. Empire Steel and Iron Co.*, 87 N. J. L. 481. The Supreme Court considered that he did apply it. We think he did not.

In the *Vishney* case there was an eighty per cent. loss of the usefulness of both eyes. The trial judge there held that compensation for injury to each eye should be considered separately under clause (c) and calculated the number of weeks for which compensation should be made on the basis of an eighty per cent. injury to each eye, which would make eighty weeks (eighty per cent. of one hundred weeks) for each eye, or a total of one hundred and sixty weeks for both. That award the Supreme Court reversed, saying: "It appearing that there was a loss of the usefulness of both eyes to the extent of eighty per cent., the prosecutor was entitled to compensation for three hundred and twenty weeks."

That case, therefore, furnishes no support for the action of the trial judge, in the present case, in adding ten per cent. of one hundred weeks for the injury to the eye after having allowed fifty per cent. of four hundred weeks for total and permanent disability on account of the fifty per cent. loss of the usefulness of both hands. It must be obvious that if such a case of partial but permanent disability of three members is to be apportioned on the basis of total and permanent disability, it must be in the proportion that all of the injuries bear to total and permanent disability, and not partly on the ratio that two of them bear to total and permanent disability and partly on the compensation provided for injury to the

Orlando v. Ferguson & Son.90 N. J. L.

third member only. It must be equally manifest that compensation for total and permanent disability cannot exceed four hundred weeks; and if there is a partial but permanent disability the compensation cannot exceed a certain definite portion of four hundred weeks. The method adopted by the trial judge gave a portion of four hundred weeks and a portion of an additional one hundred weeks, making a portion of a total of five hundred weeks. That this method is erroneous is also seen by supposing, for convenience, the injury to the eye to have been a fifty per cent. one. There is no legal relation that would cause the two hands to be considered together rather than one hand and one eye. There is a physical relation between the two, but not a legal one, as the statute considers any two indiscriminately. If the court had combined the one eye and one hand as a fifty per cent. of the total, giving two hundred weeks, and taken the other hand separately, it would have resulted in a total of two hundred and seventy-five weeks. Whereas, if the two hands had been combined, resulting in two hundred weeks and fifty weeks added for half of the loss of the eye, the total would have been two hundred and fifty weeks. We consider either one of these methods as legally justifiable as the other. Of course, neither is right.

We do not, however, approve of the method of award advocated by the appellant, namely, that compensation should be calculated by taking each injured function separately and adding up the items of partials. This was the method condemned in *Vishney v. Empire Steel and Iron Co.*, *supra*. The appellant contends that the Vishney case was wrongly decided, the argument being that "this class" (page 304 of act of 1913) means partial in character and permanent in quality (clause c) and excludes any consideration of the allowance for total and permanent disability as a standard, and hence, that if there is any percentage of total and permanent disability less than one hundred, it must be reckoned by adding up the items of partials. But we think not.

We consider that the Vishney case, so far as its underlying principle above stated is concerned, was rightly decided. We

90 N. J. L.Orlando v. Ferguson & Son.

consider that the facts in that case and in this bring both within the "other cases in this class or where the usefulness of a member or any physical function is permanently impaired," and hence "compensation shall bear such relation to the amounts stated in the above schedule (*i. e.*, for both hands, or both eyes, or any two of them, four hundred weeks) as the disabilities bear to those produced by the injuries named in the schedule." That compensation should not be awarded by adding up the items of partials taken separately will be seen by supposing the case of an eighty per cent. injury of both hands and both feet. By that method we would get eighty per cent. of one hundred and fifty weeks for the first hand, *i. e.*, one hundred and twenty weeks; one hundred and twenty weeks for the second hand; eighty per cent. of one hundred and twenty-five weeks (being number of weeks allowed in schedule for one foot), *i. e.*, one hundred weeks for the first foot and one hundred weeks for the second foot, making a total of four hundred and forty weeks, or forty weeks more than the number of weeks allowed for total and permanent disability.

We think the true rule is, that in the case of a partial but permanent loss of the usefulness of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, compensation shall bear such relation to compensation for total and permanent disability as the partial but permanent disabilities collectively bear to total and permanent disability.

It follows, therefore, that when the trial judge found that there was a fifty per cent. loss of the usefulness of each hand, and a ten per cent. loss of the usefulness of one eye, he should then have found what percentage of total and permanent disability the combination of fifty per cent. loss of the usefulness of two hands and ten per cent. of one eye made, and should have awarded that percentage of four hundred weeks. It is not strictly a mathematical problem. It is not to be solved by adding up the fractional parts, but upon the basis of the percentage of total and permanent disability reasonably found

to be produced by the several injuries considered collectively and with due regard to their cumulative effect.

In this particular case it may be that the *result* was approximately right, though the method by which it was reached was wrong, and, as we have pointed out, would lead to wrong results in many cases of partial but permanent loss of the usefulness of two or more members. What the trial judge found in *result* was fifty-two and one-half per cent. of four hundred weeks. If he had found that the combination of fifty per cent. of the loss of both hands and ten per cent. of the eye equaled, for example, fifty-three per cent. of total and permanent disability, it may be that such would be regarded as a reasonable finding; but with respect to that, of course, no opinion is now expressed.

The judgment of the Supreme Court will be reversed, to the end that the proceeding be remanded to the Common Pleas Court for a judgment based upon a finding made in accordance with the foregoing principles.

No costs will be allowed in this court.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

SECURITY TRUST COMPANY, EXECUTOR OF LEONARD MORSE, DECEASED, RESPONDENT, v. EDWARD I. EDWARDS, STATE COMPTROLLER, APPELLANT.

Argued March 13, 1917—Decided June 18, 1917.

The interest of a nonresident deceased pledgor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the act of 1909 (*Pamph. L.*, p. 325; *Comp. Stat.*, p. 5301), as amended in 1914. *Pamph. L.*, p. 287.

90 N. J. L.

Security Trust Co. v. Edwards.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 396.

For the appellant, *John W. Wescott*, attorney-general, and *John R. Hardin*.

For the respondent, *Lum, Tambllyn & Colyer, Ralph E. Lum* and *Joseph F. McCloy* (of the New York bar).

The opinion of the court was delivered by

TRENCHARD, J. This is an appeal by the state comptroller, defendant in *certiorari*, from a judgment of the Supreme Court setting aside an inheritance tax levied under the act of 1909 (*Pamph. L.*, p. 325; *Comp. Stat.*, p. 5301), as amended in 1914. *Pamph. L.*, p. 267.

The prosecutor below, Security Trust Company, a Connecticut corporation, is the executor of the will of Leonard Morse who died resident in Hartford, Connecticut, on April 2d, 1915. Morse left no real estate whatever, either within or without New Jersey. His gross estate amounted to \$64,523.85, and by the will went entirely to collaterals or those unrelated to the testator. The estate consisted largely of certain securities, viz., corporate stock and four bonds appraised in the aggregate at \$63,285.50. All of these securities had been pledged by Morse in his lifetime, accompanied by a power of attorney in blank to the Phoenix National Bank of Hartford, Connecticut, to secure his promissory note of \$37,500 upon which there was due \$5.21 of interest, together with all of the principal amount, at the time of his death. It does not appear that this note had been called prior to the death of Morse or that the pledgee had caused any of the securities to be transferred to it or that any demand had been made upon him prior to death for the payment of the note.

Among the securities so pledged were New Jersey stocks appraised in the aggregate at \$28,249.

The comptroller appraised the New Jersey stocks at the figures above mentioned, and the decedent's interest in the

New Jersey stocks at the sum of \$11,507. This amount was obtained by prorating the amount of the loan together with such portion of the general deductions as the other assets were insufficient to meet, over all of the stocks pledged. The value of the equity in the New Jersey stocks was arrived at by applying to the equity in all of the stocks the fraction represented by the value of the New Jersey stocks over the value of all the securities pledged.

Treating the gross estate for the purpose of taxation as the value of the equity in all of the stocks, plus the value of the other assets, the comptroller arrived at the proportion demanded by the method of computation prescribed for non-resident estates in section 12 of the act (namely, the ratio of the New Jersey property to the total property wherever situated), which proportion was found to be forty-two and six-tenths per cent. The tax was then calculated in the manner prescribed in that section and found to be \$527.55.

The comptroller refused to consent to the transfer of the New Jersey stocks to the executor of the decedent, unless such tax upon the decedent's equity therein was paid, and accordingly it was paid.

The amount of the tax, *i. e.*, the method of computation, is not challenged, and with that we are not concerned.

The only question presented by the record, and, indeed, the only question argued, is that decided by the Supreme Court, namely, Is the interest of a non-resident deceased pledgor of stock of a New Jersey corporation in such stock subject to the transfer tax imposed by *Pamph. L. 1909, p. 325*, as amended by *Pamph. L. 1914, p. 267*?

We are of the opinion that that question must be answered in the affirmative.

The view of the Supreme Court was that Morse had ceased to be the owner before his death; hence there was no succession. The court does, indeed, refer to his "interest" in the stock, but the tenor of the opinion appears to be that there is no taxable succession if the decedent owned anything less than the entire legal and beneficial interest in the stock.

Such a view ignores the language of the statute (*Pamph. L. 1909, p. 325, as amended by Pamph. L. 1914, p. 267*), taxing “* * * the transfer of any property * * * or of any interest therein or income therefrom, in trust or otherwise. * * * When the transfer is by will * * * of shares of stock of corporations of this state, * * * and the decedent was a non-resident of the state at the time of his death * * *.” Section 1.

“26. The words ‘estate’ and ‘property’ wherever used in this act * * * shall be construed to mean the interest of the testator * * * passing or transferred to the (successors) * * *. The word ‘transfer,’ as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future,” &c. Section 26.

The only authority cited by the court below is that of Surrogate Fowler, of New York county, *In re Ames’ Estate* (1913), 141 N. Y. *Supp.* 793. But that decision is in conflict with the doctrines of the highest court of New York, as we shall show.

We think that a non-resident pledgor’s interest in New Jersey stocks is a property interest which has a *situs* here for the purpose of succession taxation.

As between the pledgor and pledgee, the pledgor is still the general owner. The pledgee has a special property only, and upon payment of the debt this is extinguished.

That rule has been frequently stated and applied without challenge by English judges.

In the early case of *Mores v. Conham* (1610), *Owen* 123; 74 *Eng. Reprint* 946, the court recognized that the right of the pledgee was but a special interest.

In *Coggs v. Bernard* (1702), 2 *Ld. Raym.* 909; 1 *Sm. Lead. Cas.* *199, Chief Justice Holt stated the same principle. The learned annotator (at p. *228) says:

“A pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the

Security Trust Co. v. Edwards.

90 N. J. L.

pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglected to use the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it."

Another leading case is *Donald v. Suckling*, L. R., 1 Q. B. 585; 35 L. J. Q. B. 232.

Another famous case is *Sewell v. Burdick* (1884), 10 App. Cas. 74; 54 L. J. Q. B. 156, where Lord Fitzgerald says that the pledgees "acquired a special property in the goods, with a right to take actual possession should it be necessary to do so for their protection or for the realization of their security. They acquired no more, and, subject thereto, the general property remained in the pledgor."

A very recent opinion by the privy council in a prize case is *The Odessa*, 1 A. C. (1916), 145; *affirming*, A. C. (1915), 52. Prior to the outbreak of the European war, German owners of the cargo had by assignment of the bills of lading pledged the cargo to British bankers for advances made prior to the outbreak of the war. After the war began, and while the vessel was on the high seas, the cargo was seized and condemned as prize. The contest was between the British pledgees and the crown. Lord Mersey, speaking for the court, says: "All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned."

Our own decisions are uniformly to the same effect. In *Donnell v. Wyckoff* (*Supreme Court*, 1886), 49 N. J. L. 48, wherein the subject-matter of the pledge was corporate stock, Mr. Justice Depue said (at p. 49):

"Upon a pledge of property as security for a debt, the pledgee has only a special property. The general property is in the pledgor, subject to the rights of the pledgee."

In *Broadway Bank v. McElrath* (*Chancellor Green*, 1860), 13 N. J. Eq. 24, the conflicting rights of a pledgee of stock and the attaching creditors of the pledgor were dealt with. It would appear from the opinion that the court entertained no doubt that the interest of a non-resident pledgor in stock of a New Jersey corporation pledged to a non-resident was subject to attachment, under the New Jersey statute, and the

court (on p. 26) says that the rights of the creditors were unquestioned, except so far as they conflict with the rights of the pledgee. And, speaking of the effect of a pledge, says:

"The absolute ownership of the stock, it is true, was not transferred, nor was it intended it should be."

In *Meisel v. Merchants National Bank* (Court of Errors and Appeals, 1913), 85 N. J. L. 253, it was said, in effect, that the pledgor has the right to bring a possessory action against the pledgee to recover the stock itself, providing only he makes and keeps good a tender of the debt.

In *McCrea v. Yule*, 68 N. J. L. 465, the Supreme Court, in 1902, in a case of an assignment of a chose in action as collateral security, said (at p. 467):

"A pledgee of personal property, assigned as collateral security, has the right to collect the interest, dividends and income accruing on the collateral assigned, accounting to the pledgor upon the redemption of the pledge. In making such collections the pledgee is a trustee of the pledgor to see to the proper applications of the funds collected or to refund the same to the pledgor if the debt be otherwise paid."

In *Mechanics' Building and Loan Association v. Conover*, 14 N. J. Eq. 219 (reversed on other grounds, *Herbert v. Mechanics' Building and Loan Association*, 17 Id. 497), the court said that when shares of stock are pledged, they "remain the property of the shareholder for every purpose excepting that of defeating the lien" of the pledgee.

In the United States Supreme Court, drawing the familiar distinction between a chattel mortgage and a pledge, Mr. Justice Pitney says, in *Dale v. Pattison*, 234 U. S. 399, 405:

"On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage."

The law of Connecticut appears to be to the same effect. In *Robertson v. Wilcox* (1870), 36 Conn. 426, the highest court of that state (at p. 430) said:

"A pledge of property does not carry with it the title to the thing pledged. The title remains as before. All that

Security Trust Co. v. Edwards.

90 N. J. L.

passes to the pledgee is the right of possession, coupled with a special interest in the property, in order to protect the right."

It is this intangible proprietary interest of the pledgor in the corporate property that the pledgor's executor succeeds to.

Now, the doctrine is too well established to need discussion that the stock of a New Jersey corporation has a *situs* in this state and is subject to succession taxation here. *Dixon v. Russell* (Court of Errors and Appeals), 79 N. J. L. 490; *Carr v. Edwards*, 84 *Id.* 667; *Hopper v. Edwards*, 88 *Id.* 471.

The matter is nowhere more fully and ably discussed than in the opinion of Mr. Justice Garrison, in the Supreme Court, in *Neilson v. Russell* (1908), 76 N. J. L. 27; reversed on another point, *Id.* 655 (1908). The following is quoted therefrom, not for the purpose of supporting this elementary proposition, but as illuminating the precise question under review in the present case (at p. 35):

"In this country, where the general doctrine of the state courts is that the *situs* of property governs its liability to succession taxes, the weight of authority is that the stock in a corporation is subject to the imposition of succession taxes by the state that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial."

The case of *Amparo Mining Co. v. Fidelity Trust Co.* (Court of Errors and Appeals, 1909), 75 N. J. Eq. 555; affirming opinion of Vice Chancellor Stevenson, in 74 *Id.* 197, is also instructive. There the jurisdiction of the courts of the state of incorporation over the enforcement of property interests in stock as against non-residents was upheld.

It being firmly established that the stock is subject to succession taxation by the state, it necessarily follows that not only is the entire legal interest in the stock subject to taxation by the state, but as well every undivided or fractional interest in any such given share of stock, and as well any proprietary interest in such share of stock though it be an interest of a quality different in character from a mere frac-

tional or other legal interest less than the whole. The interest of a pledgor of a share of stock being such a proprietary interest in the share of stock itself, and the stock being taxable, it follows that the pledgor's interest is taxable, whether it be called an equity of redemption or by some other name.

We need not dwell on the distinctions which exist in respect to *situs* for the purpose of property taxes, on the one hand, and succession taxes on the other. The argument of respondent is not forwarded by calling the pledgor's right an equity of redemption, or *chose in action*, or intangible. The stock itself is a *chose*, and intangible. While an intangible right has really no locality, it must, in the nature of things, have ascribed to it a *situs* for legal purposes. The *situs* is based on the power of the sovereign, and if the sovereign has power to deal with it effectively as a property right, it may tax it as having an ascribed *situs* within its jurisdiction.

The Amparo Mining Company case, *supra*, at once suggests such power. We note, especially, the attitude of the court towards the rights of *bona fide* holders. If any one class of such holders was more prominently in the mind of the court than another, it was probably that of pledgees. But the court did not turn aside from rendering judgment because of the possibility that a non-resident owner had pledged his stock to a non-resident which, if respondent's argument be sound, would at once have ousted the court of jurisdiction.

It can hardly be doubted that the pledgor could resort to our courts to enforce a conflicting property right in respect to his stock; and that because he could obtain effective relief nowhere but in the domicile of the corporation. To be more concrete, suppose that Morse, a resident of Connecticut, had pledged New Jersey stock to residents of Massachusetts and New York jointly, and that the latter wrongfully delivered the same to a resident of Oregon, and that the stock had no market value (see *Safford v. Barber*, 74 N. J. Eq. 352), where could he obtain relief except in New Jersey? *Gregory v. New York, Lake Erie and Western Railroad Co.*, 40 Id. 38. Who would doubt that such a suit would be *quasi in rem*?

Security Trust Co. v. Edwards.90 N. J. L.

The New York courts recognize that the pledgor has a *residuary interest*.

In *Warner v. Fourth National Bank*, 115 N. Y. 251, the interest of a non-resident pledgor of notes held in pledge by a resident was held to be subject to attachment in New York state. Judge Gray said: "The title to property may remain in the pledgor, but the pledgee has a lien, or special property in the pledge, which entitled him to its possession against the world." And further: "The pledgor's residuary interest in the pledge constitutes a claim or demand upon the pledgee, which is property, and hence may become the subject of attachment." And again: "We think the attachment in question here operated to secure to the (attaching creditor) a lien upon the pledged property, to the extent of the interest of the (pledgor), and that interest was the right to the pledged property, or so much of it, or of its proceeds from any collection, as remained after the satisfaction of the pledgee's claim for advances."

See, also, opinion of the same judge in *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, where it is said: "The pledgee obtains a special property in the thing pledged, while the pledgor remains general owner."

The most distinguished New York judge of all times, Chancellor Kent, expressly held, in *Cortelyou v. Lansing* (1805), 2 Cai. Cas. 200, that the legal property in a pledge does not pass as in the case of a mortgage with defeasance; that the general ownership remained with the pledgor and only a special property passed to the pledgee, and further, that the pledgor's interest passed to his administrators.

If the stock has a *situs* here, where else can be the *situs* of the *residuum*?

If the interest of the pledgee is less than absolute and unqualified ownership, how can the residuary interest of the pledgor have a *situs* other than that of the subject of the pledge? The stock never ceases to have a *situs* in this state, whoever may be the owner. *Neilson v. Russell*, *supra*. If the transfer of full ownership does not change the *situs* of the property, how can the transfer of a limited right take out of

the jurisdiction or affect the *situs* of what of the rights of ownership remain after such partial transfer?

The tax is *in rem*; the *res* is the succession to the proprietary right that a stockholder has in a corporation of this state. Unless the whole of the proprietary right be transferred, the remainder must be taxable here as property of the pledgor having a *situs* here, to which his executor succeeds. Of course, the stock has a *situs* here; and the general property in the thing pledged must continue, notwithstanding the pledge, to have a legal *situs* here for the purpose of the taxation of the succession to such general property.

The power to tax being established, we have no difficulty in finding in the statute the intention to do so. It is clear that every proprietary interest of whatever nature in those species of property subject to tax is included. The fourth subdivision of section 1 imposes tax "upon the *clear* market value" of the property, which impliedly recognizes that the property taxed may be encumbered. Sections 2 and 3 tax future and contingent estates of every character. Section 12 forbids the transfer, by a corporation, without the comptroller's waiver, of shares of stock of, "or other interests in," the corporation. The last paragraph of section 12 (the ratio provision) necessarily contemplates that every kind of property interest be brought into hotchpot, and puts the non-resident on the same footing as the resident. Section 26 says that the word "transfer" shall be taken to include the passing of "any interest" in property, present or future.

Such words as "property" and "interest" are ordinarily used in a revenue act in a popular sense, and should be broadly construed. *Smelting Company v. Comm. of Inland Revenue*, 2 Q. B. (1896), 179; 65 L. J. Q. B. 513; *affirmed*, 1 Q. B. (1897), 175; 66 L. J. Q. B. 137; *In the Matter of Whiting*, 150 N. Y. 27.

The pledgor's "equity" certainly is property in a popular sense. It has value; it may be sold; it may be encumbered; it may be made the basis of extending credit.

See, also, as to the extensive application of the language of the act, *Hopper v. Edwards*, 88 N. J. L. 471.

Some stress is laid below by the respondent on the rights of the pledgee, and their supposed infringement by the comptroller, but they are not here involved. No pretence is made by the state that its lien on the stock is other than inferior to that of the pledgee. The latter is not before the court, and there appears in the case nothing of interference with his rights. Certain practical difficulties in the collection of such a tax as this may be compassed within the imagination, but the present case is free therefrom.

It is enough for the decision of this case that the comptroller's consent to transfer was requested by the executor of the decedent's will; that he refused unless payment of the tax was forthcoming; that the tax was paid, the waivers issued, and the stock transferred. The only question before the court is, Had the legislature the power to authorize the assessment, and did it do it?

In the opinion of the Supreme Court (but whether it was the basis of the decision we cannot tell), mention is made of the possibility that the "equity of redemption" be rendered valueless by a resort to the security after the pledgor's death. This possibility would, with equal force, support the proposition that no tax should be levied on an equity in real estate, since that might be foreclosed. This might be due to the owner's neglect to pay the encumbrance, or for other reasons. Likewise, a house might be destroyed by wind or flood; a chattel burnt or lost; the assets of the estate might be embezzled; a debt become uncollectible by incompetent management; a security valueless by fluctuations in the market or the receipt of "news from abroad."

The tax is on the succession, which occurs *at death*; and is then *due and payable*. Section 1. If the subject-matter of the succession be of value at that time, *and the universal or particular successors choose to accept the succession*, the state may then levy, as of the situation then existing, a premium upon the privilege so to succeed. What becomes of the thing after the state has admitted the successors to the succession is not of its concern. And so hold the authorities. See *Tilford v. Dickinson*, 79 N. J. L. 302, 305; reversed on another

90 N. J. L.

Security Trust Co. v. Edwards.

point, 81 *Id.* 576; *McCurdy v. McCurdy*, 197 *Mass.* 248; *In re Penfold's Estate*, 216 *N. Y.* 171.

The argument of respondent that due prudence and caution requires that assessment be withheld pending realization on the pledge is self-destructive. It will not do to say that the state should take into computation the loss or shrinkage, if any, which has taken place in the meantime. It would not be argued that if there be an increase in value a tax should be laid on this. Of course, the state is not bound to stay the exercise of the taxing power at the pleasure of the pledgee, and chance the collection of a tax on his judgment and honesty, and on the variability of the market's demand for the thing to be sold.

In the case at bar, it appears that certain of the New Jersey stocks were sold by the pledgee shortly after Morse's death, *at a price in excess of the appraisement*. Certainly, this did not render valueless the "equity" in these stocks. It was a realization of their value. While the proceeds were applied in reduction of the principal of the debt, this increased correspondingly the "equity" in the other stocks. It is as if the proceeds of the Bethlehem steel preferred which was sold were paid to the respondent, and by it applied to the payment of the testator's legal obligation.

The validity of the tax, therefore, is not affected by any of the foregoing matters.

Upon the whole, our conclusion is that the interest of a non-resident deceased pledgor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the act of 1909 (*Pamph. L.*, p. 325; *Comp. Stat.*, p. 5301), as amended in 1914. *Pamph. L.*, p. 267.

The judgment below will be reversed, with costs, with direction for the entry of an order below affirming the assessment and tax.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

Stand. Gas Power Corp. v. New Eng. Cas. Co. 90 N. J. L.

STANDARD GAS POWER CORPORATION, APPELLANT, v.
NEW ENGLAND CASUALTY COMPANY, RESPONDENT.

Argued March 5, 1917—Decided June 18, 1917.

1. Where a bond refers to another contract and is conditioned for the performance of the specific agreements set forth therein, such contract, with all its stipulations, limitations or restrictions, becomes a part of the bond and the two should be read together and construed as a whole.
2. A bond given by a contractor and his surety to the Passaic valley sewerage commissioners, conditioned that it shall be void if the contractor shall pay for all labor and materials furnished, and shall perform all the obligations of his contract for building a sewer (by which contract he agreed to save harmless the commissioners from claims for labor and materials), is limited to an indemnity of the obligee and is not made for the benefit of persons who furnish materials to the contractor, even though the contract further provided that the commissioners might pay claims for labor and materials used in the work and call upon the contractor to repay the same, or might retain funds in their hands, due or to become due to the contractor, for that purpose.
3. The statute (*Comp. Stat.*, p. 4059, § 28) permitting a third party not privy to a contract and who has given no consideration, to sue thereon, is limited to those for whose benefit the contract is made, and does not extend to third parties who indirectly and incidentally would be advantaged by its performance.

On appeal from the Supreme Court.

For the appellant, *McDermott & Enright*.

For the respondent, *Robert Strange* (*Stuart McNamara*, of the New York bar, on the brief).

The opinion of the court was delivered by

TRENCHARD, J. This is an appeal from a judgment for the defendant rendered by the trial judge, sitting without a jury, at the Hudson Circuit.

We are of the opinion that the judgment must be affirmed. The pertinent facts are these:

90 N. J. L. Stand. Gas Power Corp. v. New Eng. Cas. Co.

The Passaic valley sewerage commissioners (a public corporation of the State of New Jersey) advertised for bids for the building of a section of the Passaic valley sewer, with notice that the successful bidder would be required to execute a contract and bond with satisfactory surety in a certain form prescribed. The Healey Contracting Company, a corporation of New Jersey, pursuant to such call, bid, in writing, for such work upon the form prescribed by the commissioners. Such bid was accepted by the commissioners and the Healey Contracting Company entered into contract with the commissioners for the execution of such work, delivering to the commissioners concurrently therewith its bond in the sum of \$20,000, executed by it as principal and by the New England Casualty Company as surety, both contract and bond being in the form prescribed. The bond provides that the principal and surety are "held and firmly bound unto the Passaic valley sewerage commissioners in the sum of \$20,000." The bond further provides that such sum is "to be paid to the Passaic valley sewerage commissioners, for which payment, well and truly to be made, they bind themselves," &c. The condition of the bond is as follows:

"Now, the condition of this obligation is such that if the said principal shall well and truly keep and perform all the obligations, agreements, terms and conditions of this said contract on its part to be kept and performed and shall also pay for all labor performed and furnished and for all materials used in carrying out of said contract, then this obligation shall be void; otherwise, it shall remain in full force and virtue."

Article 13 of the contract provides that—

"The contractor shall take all responsibility of the work, and take all precautions for preventing injuries to persons and property in or about the work; shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the land in or on which the work is done is different from what was estimated or expected, or on account of the weather, elements or other cause; and he shall assume the defence of, and indemnify and save

Stand. Gas Power Corp. v. New Eng. Cas. Co. 90 N. J. L.

harmless, the commissioners and their officers and agents from all claims relating to labor and materials furnished for the work," &c. Article 17 provides, in effect, that the commissioners might pay claims for labor and materials used in the work and call upon the contractor to repay the same, or the commissioners might retain funds in their hands due or to become due to the contractor for that purpose.

The Healey Contracting Company entered into the performance of the contract, and it, and its receiver, after it had been decreed to be insolvent, purchased, partly from the plaintiff and partly from the plaintiff's assignor, certain of the materials used in the construction of the sewer called for by the contract.

These claims for materials purchased from the plaintiff and the plaintiff's assignor, and used in the performance of the work, remaining unpaid, the plaintiff requested the commissioners to enforce the bond for the benefit of the plaintiff. This the commissioners did not do, and, subsequently, the plaintiff brought this suit against the New England Casualty Company, the surety, upon the theory that the action is maintainable by the plaintiff as one for whose benefit the bond was given.

We are of the opinion that the trial judge rightly held that the bond in question was limited to an indemnity of the obligee and was not made for the benefit of persons who furnished materials.

The plaintiff bases its contention that the action is maintainable by it as one for whose benefit the bond was given, upon the statute which reads as follows:

"Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon in any court, and may use the same as matter of defence in any action brought against him, notwithstanding the consideration of such contract did not move from him." *Comp. Stat.*, p. 4059, § 28.

But that contention is untenable. No doubt, where, as here, a bond refers to another contract and is conditioned for

90 N. J. L. Stand. Gas Power Corp. v. New Eng. Gas. Co.

the performance of the specific agreements set forth therein, such contract, with all its stipulations, limitations or restrictions becomes a part of the bond and the two should be read together and construed as a whole.

But, so construed, it is clear that the bond is a contract of indemnity for the benefit of the Passaic valley sewerage commissioners, and not for the benefit of those furnishing materials. The intent and purpose which the commissioners had in requiring it were twofold: the protection of the public interest in the proper performance of the work, and the protection of the commissioners from liability for claims on account of the work. The language of the bond, apart from the condition therein, clearly indicates that the bond is solely for the benefit of the obligee, and the condition of the bond is a mere limitation and restriction upon the language found in the obligation thereof, to the effect that the principal and surety "are held and firmly bound unto the Passaic valley sewerage commissioners in the sum of \$20,000," and the person to whom the obligation is to be discharged is manifested by the further provision of the bond, to the effect that such sum is "to be paid to the Passaic valley sewerage commissioners." Reading the bond in connection with the provisions of the contract, it appears that the commissioners are given two means of protecting themselves from loss resulting from unpaid claims for labor and materials—first, by paying the claims themselves and calling upon the contractor to repay them, and if the contractor fails to make such repayment, to rely upon the bond furnished by the contractor, or, secondly, to retain any moneys due or to become due for the payment of such claims. But it does not appear that the bond was made, or intended to be made, for the protection of persons furnishing materials to the contractor who, at most, were merely indirectly and incidentally advantaged thereby.

Now, the statute upon which the plaintiff relies (*Comp. Stat.*, p. 4059, § 28), permitting a third party not privy to a contract, and who has given no consideration, to sue thereon, is limited to those for whose benefit the contract is made

Kitchell v. Crossley.

90 N. J. L.

and does not extend to third parties who indirectly and incidentally would be advantaged by its performance. *Styles v. Long Co.*, 67 N. J. L. 413, 418; *S. C.*, 70 *Id.* 301, 305; *Lawrence v. Union Insurance Co.*, 80 *Id.* 133, 136; *American Malleables Co. v. Bloomfield*, 83 *Id.* 728, 736.

The judgment below will be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISOH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

BRUCE P. KITCHELL, RESPONDENT, v. JAMES E. CROSSLEY, RENA P. CROSSLEY AND CORNELIA V. PEDDIE, APPELLANTS.

Submitted March 26, 1917—Decided June 18, 1917.

Plaintiff, an architect, was employed to make plans and specifications for a new building. A dispute having arisen respecting the amount of his compensation, the parties agreed in writing that he should be paid \$1,500 for said plans and specifications and supervising the construction of the building, \$750 of which was payable upon the completion of the plans and specifications, \$375 when the building was half completed, and the remainder upon completion. The \$750 was paid upon the signing of the agreement but the defendants never proceeded to the construction of the building. *Held*, in a suit by the architect to recover for his services, that the written contract was controlling as to the rate of compensation and that the amount of same was to be determined according to the rule laid down in *Kehoe v. Ruthersford*, 56 N. J. L. 23. *Stephen v. Camden and Phila. Soap Co.*, 75 *Id.* 648, distinguished.

On appeal from the Essex Circuit Court.

90 N. J. L.Kitchell v. Crossley.

For the appellants, *Raymond, Mountain, Van Blarcom & Marsh*.

For the respondent, *Church & Harrison*.

The opinion of the court was delivered by

PARKER, J. The plaintiff's claim was for the "reasonable value" of his services as architect in drawing plans and specifications and receiving bids for a proposed new building which was never built according to such plans. Defendants undertook to meet this by setting up a written agreement signed by plaintiff and by James E. Crossley as defendants' agent, whereby plaintiff stipulated to draw the plans, &c., and supervise the erection of the building for \$1,500, of which \$750 was to be payable on completion of plans, \$375 when building should be half completed, and the remainder on completion. Plaintiff attacked this as having been "abandoned" and claimed for what he had done at the architect's customary rate, as testified, of three-fifths of six per cent. on the estimated cost of the building, and had a verdict of \$2,757.26 besides the \$750 which had been paid to him at the time of executing the written agreement, or about \$3,500 in all. He did nothing after receiving bids, though he was ready to perform all needed services, the defendants having refused to go on according to his plans and having employed another architect. The decision turns upon the rule to be applied touching the amount of recovery.

When plaintiff was first employed there was no specific agreement or understanding as to the rate of his compensation, and after the plans were substantially ready, he sent Mr. Crossley a bill for \$2,520, for services up to that point. This, and later communications threatening suit, brought Crossley to his office, and there was some disputing about the amount of compensation, which resulted in the preparation, by plaintiff, of the following paper in the form of a letter or proposal on plaintiff's letter-head, and signed by him. Both parties agree that it was accepted by Crossley, and it is plain that his signature thereto was intended as such acceptance:

Kitchell v. Crossley.90 N. J. L.

"NEWARK, N. J., October 27, 1914.

Mr. J. E. Crossley, Newark, N. J.:

DEAR SIR—I propose to make the plans, specifications and supervise the works on the new four-story and basement building on the corner of Market and Halsey streets, Newark, N. J., for the Peddie estate, for the sum of one thousand five hundred (\$1,500) dollars. Seven hundred and fifty (\$750) on completion of plans. Three hundred and seventy-five (\$375) when building is half erected. Balance as work progresses.

Yours truly,

BRUCE P. KITCHELL.
J. E. CROSSLEY."

At the time this paper was signed by the plaintiff, on his own part, and by Crossley as representing the defendants, the plans and specifications had not been sent out to prospective bidders. The case shows that the \$750 stipulated for was paid at the time the agreement was made, or almost immediately thereafter, and that plaintiff was instructed to get the bids. He did so, and, according to his testimony, Crossley never came to his office to consider the bids, and did nothing further in the matter. As a result, the plaintiff was not only not required to complete the work he had stipulated to do by this agreement, but was actually prevented from completing it by the action of the defendants.

At the trial it was claimed by the defendants that this agreement was a compromise and settlement of plaintiff's claim for what he had actually done, and a written agreement with respect to what he should be paid therefor, and that it was binding upon the plaintiff. The plaintiff's claim was that by reason of the failure of the defendants to go on with the building, he was not bound by the agreement either for what he had done or with respect to what he was to do. The trial judge left it to the jury to say, first, whether the written agreement was a settlement for the work that had been done by the architect up to that time; whether (to quote his language), when they signed that agreement, it was with an

understanding between the architect and Mr. Crossley that what work had been done up to that time was included in the sum of \$1,500, which he was to receive, as well as the services which were afterwards to be performed by him, as the architect, in the construction of this building. He went on to say that if it was, a certain rule of law applied, and then stated the rule as laid down in *Kehoe v. Rutherford*, 56 N. J. L. 23, and *Wilson v. Borden*, 68 Id. 627; and under that rule limited the plaintiff's recovery to three-fifths of the total price of \$1,500, stating that no claim, as he understood it, was made for profit on the work that still remained to be done by the plaintiff, and that there was no evidence of what the profit would be. He then further charged as follows:

"Now, gentlemen, on the other view of the case, if you should find that the agreement of October 27th was not in settlement of all the work that had been done prior to that time, then the architect, Mr. Kitchell, would be entitled to recover for his services, whatever they were worth up to that time, less the \$750 which he received at that time."

This was followed by instructions as to the details of the amount recoverable under those circumstances.

Defendants' counsel requested a charge laying down the rule of *Kehoe v. Rutherford*, *supra*, in the language of that case, which was refused, and an exception noted, both to this refusal and to the portion of the charge permitting a recovery for the value of the services as above set forth.

We consider that there was error in the matters excepted to. There was no question but that the written agreement was made because of a dispute between the parties and for the purpose of settling that dispute. At that time plaintiff had rendered some services for which he was, perhaps, then entitled to compensation, but at an amount not agreed upon, and therefore uncertain. It was evidently the desire of both parties that the amount that he should be entitled to receive should be fixed and settled between them, with a view of avoiding further controversy, both as to services already rendered and as to such as the parties contemplated should be

Kitchell v. Crossley.

90 N. J. L.

rendered. If this agreement had been made before the plaintiff performed any services, and after he had finished the plans and specifications the defendants had refused to go further, we think there can be no question but that the rule of *Kehoe v. Rutherford* would apply, and the damages recoverable on a breach, whereby plaintiff was prevented from performing in full, would be limited by that rule as applied to the contract price. The fact that the agreement was made after some work had been done, and a dispute had arisen, makes no difference in the result, except that the additional element is introduced, of a compromise and settlement of the dispute, the legal consideration of which cannot be successfully challenged. *McCoy v. Milbury*, 87 N. J. L. 697.

Respondent relies upon the case of *Stephen v. Camden and Philadelphia Soap Co.*, 75 N. J. L. 648, as authority for the claim that the contract now under consideration was abandoned, and that the rule of reasonable value for the services should be applied. There is no doubt that the plaintiff should have the reasonable value of his services, but the question is, how is that reasonable value to be ascertained? Is it to be ascertained by inquiry with respect to the usual and customary rate of compensation, in the absence of special contract, or are we to look to the contract itself as determinative of the rate of compensation? This question is not answered by the case cited. An examination of that decision fails to disclose how much the plaintiff recovered or on what basis. The errors assigned were that the court below should have construed the contract so as to relieve the defendant from liability and erred in refusing to grant a nonsuit, or, if not, then to direct a verdict in its favor. These were the only two questions considered. In deciding them the court had occasion to quote from authorities which, in laying down the rule that plaintiff was entitled to recover something for his services, also discussed the question whether the price fixed by the contract, if any, should be made the conclusive test of the value of the services rendered, or the real value of the services, though in excess of the contract price; but this court

90 N. J. L.

Security Trust Co. v. Edwards.

did not decide the question in that case, because it was not raised. The opinion concluded, however, by citing the cases of *Kehoe v. Rutherford*, *supra*, and *Ryan v. Remmey*, 57 N. J. L. 474, in both of which the amount of recovery for work done under an uncompleted contract, terminated by the wrongful act of the defendant, was predicated upon the contract price.

We are unable to see that the circumstances of this case prevent the application of the rule laid down in *Kehoe v. Rutherford* and *Wilson v. Borden*, or that there was any question for the jury as to whether the written contract between the parties applied. There was no fraud in its making, as the court itself expressly charged; its consideration was adequate, and there being nothing to vitiate it, it stood as the agreement of the parties. It was, therefore, error for the trial court to permit the jury to pass on the question whether this contract was controlling, and for this error the judgment must be reversed, to the end that a *venire de novo* issue.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

SECURITY TRUST COMPANY, EXECUTOR, ETC., APPELLANT, v. EDWARD I. EDWARDS, COMPTROLLER, ETC., RESPONDENT.

Submitted March 28, 1917—Decided June 18, 1917.

Under section 3 of the Succession Tax act of 1909 (*Comp. Stat.*, p. 5301) where there are contingent or executory interests dependent upon a power of appointment, the appraisal and taxation thereof is suspended until the exercise of the power.

Security Trust Co. v. Edwards.90 N. J. L.

On appeal from the Supreme Court, which affirmed on *certiorari* a succession tax on life interests in personalty and also a tax on interests in remainder, subject to a testamentary power of appointment.

For the appellant, *Ralph E. Lum*.

For the respondent, *Theodore Backes*, assistant attorney-general.

The opinion of the court was delivered by

PARKER, J. So far as concerns the tax upon the life interests, all questions raised herein were determined by the Supreme Court in the case of *Maxwell v. Edwards*, 89 N. J. 446, the judgment in which case has been affirmed by this court at the present term. On this branch of the case the judgment affirming the tax will be here affirmed.

With respect to the interests in remainder, the respondent's counsel concedes, quite properly, that there should be a reversal. The will of Howard S. Collins, the testator, made identical provision for each of his two daughters by bequeathing the residuary estate to a trustee, upon trust to pay the net income of one-half thereof to each daughter for life, "and on her death to pay over, transfer and convey said part of said residue, with any income not paid to her, to the person, persons, corporation or corporations that she may have designated and appointed by her last will to take the same, or, in default of a valid exercise by her by will of the power of appointment herein conferred, to those persons who under the statutes of distribution of the State of Connecticut in force at the time of her death would be entitled to succeed to her intestate estate in the proportions therein specified."

The residue was appraised at \$66,905.34, and the value of the life interests bequeathed in trust at \$38,178.38, which latter amount, or the balance thereof after deducting the statutory exemptions, was made the basis of calculation for a tax of one per cent. as property transferred to children. Section 1, paragraph 4 of act of 1909 (*Comp. Stat.*, p. 5301),

as amended by *Pamph. L. 1914*, pp. 267, 269. The remainder of the residuary estate, or \$28,726.96, was made the basis of a five per cent. tax presently imposed as subject to the general rate prescribed in the same paragraph. So far as relates to this remainder, the comptroller seems to have disregarded the provisions of section 3, which deals with estates in expectancy of a contingent or defeasible character, and the particular life estates supporting them. Where there is a power of appointment, the statute provides that "the appraisal and taxation of the interest or interests in remainder to be disposed of by the donee of power shall be suspended until the exercise of the power of appointment, and (they) shall then be taxed, if taxable, at the clear market value of such property, which value of such property shall be determined as of the date of death of the creator of the power."

It seems quite plain that in obeying this mandate, the tax on the interests in remainder will normally await the termination of the particular estate; and counsel urge as a ground of invalidity of such tax that it becomes impossible for the executor or trustee to transfer shares in New Jersey corporations until that time, without submitting to the requirement of section 12 for payment of full five per cent. tax, which was upheld in *Senff v. Edwards*, 85 N. J. L. 67, or depositing a five per cent. tax with the comptroller and taking out a waiver, as provided in chapter 58 of the laws of 1914. These provisions appear to be aimed, particularly, at the transfer of the legal estate in stock to a purchaser, or the like, rather than at the particular succession of a legatee in remainder. There is also the provision contained in the last paragraph of section 3, permitting the compounding on equitable terms of a tax not presently payable, which is evidently the "compromise" mentioned in *Senff v. Edwards*, *supra*. The statutory scheme is not obscure. If the executor wishes to sell the stock, without waiting for the specific assessment based on interests created by the will, it can be done by paying the five per cent. tax under section 12, or depositing it under the act of 1914, page 97, subject to refund of excess when later ascertained;

State v. Monetti.

90 N. J. L.

or by paying the tax on the particular interests as presently due, and compromising that against the remainders upon an equitable ascertainment of its present worth, according to section 3. We are unable to see that this scheme gives rise to any unjust or unconstitutional discriminations. It may be said that the point is not before us except as contained in the reasons for setting aside a five per cent. tax on remainders presently payable. As a condition of permitting sale of securities, such tax has the support of *Senff v. Edwards* in the Supreme Court. As a pure tax, irrespective of such sale, it is not warranted by the statute and should be set aside. To this extent the judgment of the Supreme Court is reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

THE STATE, DEFENDANT IN ERROR, v. MOLLIE MONETTI,
PLAINTIFF IN ERROR.

Submitted March 26, 1917—Decided June 18, 1917.

Parol evidence that a certain person was foreman of the grand jury and administered the oath to defendant as such foreman at a session of the grand jury, is competent on the trial of an indictment for perjury before the grand jury, as evidence that he was in fact such foreman.

On error to the Supreme Court.

For the plaintiff in error, *Anthony R. Finelli*.

For the defendant in error, *J. Henry Harrison*.

The opinion of the court was delivered by

PARKER, J. Plaintiff in error was convicted of perjury in falsely swearing before the grand jury of Essex county. At the trial it was objected that there was no proof of the administration of the oath to her by anyone competent to administer it. The clerk of the grand jury was then called and testified that the oath was administered (giving its language) by one T. F., who was then foreman of the grand jury.

This was sufficient. The question whether perjury can be assigned upon an oath taken before a *de facto* officer need not be considered. See *Izer v. State*, 77 Md. 110; 26 Atl. Rep. 282. In this state there is a line of cases holding that parol evidence that one is a public officer, or that he was acting as such, is *prima facie* evidence of his tenure of the office without resort to his written authority so to act. *Den, ex dem. Lee, v. Eyaal*, 1 N. J. L. 286; *Den v. Pond*, Id. 379; *Stout v. Hopping*, 6 Id. 125; *Gratz v. Wilson*, Id. 419 (justice of United States Supreme Court); *Brewster v. Vail*, 20 Id. 56 (sheriff); *Conover v. Solomon*, Id. 295 (justice of the peace); *Reeves v. Ferguson*, 31 Id. 107 (overseer of the poor); *Vandegrift v. Meihle*, 66 Id. 92 (official chemist); *State v. Reilly*, 88 Id. 104 (justice of the peace). We see no reason for excepting a foreman of the grand jury from the operation of this rule. There was no attempt to rebut the evidence, but the court was asked to direct an acquittal. This was rightly denied.

The other point argued in the brief (there was no oral argument) relates to a portion of the charge not challenged by any assignment of error or cause for reversal under the statute, and therefore requires no consideration.

The judgment of the Supreme Court affirming the conviction is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

Stuart v. Burlington Co. Farmers' Exchange. 90 N. J. L.

JOHN C. STUART, RESPONDENT, v. BURLINGTON COUNTY
FARMERS' EXCHANGE, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

Plaintiff relying on representations of defendant's agent that its product called "crude fish" was a good fertilizer for his intended crops of sweet corn, gave an order for "crude fish" and used what he received in response to such order in the belief that it was "crude fish." The crop failed, and he sued for damages. *Held*, (a) that there was evidence of implied warranty that the fertilizer supplied was "crude fish;" (b) that on this point evidence of the statements to plaintiff by the general manager of defendant was competent; (c) that plaintiff's oral testimony as to the receipts and expenses of growing, reaping and marketing his crop was competent, whether or not he kept books of account and without their production on his own case. See 89 N. J. L. 12.

On appeal from the Burlington Circuit Court.

For the appellant, *Gaskill & Gaskill* and *George M. Hillman*.

For the respondent, *John G. Horner*.

The opinion of the court was delivered by

PARKER, J. Plaintiff, a farmer, contracted to purchase a fertilizer called "crude fish" from defendant, upon the representation of defendant's sales agent that it was a specially good fertilizer for raising sweet corn. He received and used the contents of a number of bags shipped by defendant and labeled "crude fish," but his crop failed, and he then discovered, as claimed, that the contents of the bags were not "crude fish," but something else. He brought suit for damages on the theory of *Wolcott v. Mount*, 36 N. J. L. 262, for the loss of the crops which he claimed would have resulted had the fertilizer been as represented, and at the trial had a verdict of \$1,000.

90 N. J. L. Stuart v. Burlington Co. Farmers' Exchange.

The representations regarding the fertilizer were made by one Page, a sales agent of defendant; and the first point made on this appeal is that it was error to admit testimony of oral statements by Page at the time when the purchase was agreed on, because the contract of sale was in writing. An examination of the paper referred to, however, shows that plaintiff was not a party to it, but that it was a mere order for shipment to plaintiff's address sent by the salesman to the factory or office of his principal, signed by the salesman, but not by the plaintiff.

This also disposes for the most part of the fourth point relating to the same conversation on the redirect examination of plaintiff. It is also objected that he had already been fully examined on this head; but a repetition of his testimony was within the judicial discretion.

Under the second, third and sixth points the argument is made that it was error to permit plaintiff to testify to a conversation, after his crop failed, with Mr. Embree, admitted by defendant to be the manager of the defendant, wherein plaintiff complained that the fertilizer was not as represented, and perhaps he should have tried it out in a small way first, and Embree said "we stand behind what we sell," &c. There is no doubt of the competency of statements by Embree, as manager, that were relevant to the issue. *Agricultural Insurance Co. v. Potts*, 55 N. J. L. 158; *Smith v. Telephone Company*, 64 N. J. Eq. 770; *Carey v. Wolff & Co.*, 72 N. J. L. 510; *Bridgeton v. Fidelity Company*, 88 *Id.* 645.

If the defendant had been an individual, his statement that he held himself responsible for the quality and fitness of what he sold through his agent would be clearly relevant as an admission that he was liable for defects therein; and the fact that this statement is made by a general agent of a corporation does not deprive it of relevancy.

The seventh point alleges error in the court's refusal to strike out the testimony of plaintiff respecting the amount of his sales and losses on the crop. This was asked on the ground that plaintiff admitted he kept books showing the amount of his sales and expenses, &c., and had not produced

Stuart v. Burlington Co. Farmers' Exchange. 90 N. J. L.

them. We think there is no merit in this point. The books, if they existed, and if they were legal evidence at all for plaintiff, against the defendant, were not the best evidence so as to exclude his parol proof. The whole line of "shop book" cases in this state bears, not upon the exclusiveness, but upon the admissibility of such books, as unsworn day-to-day records of the business of the party producing them, to show facts in his own favor. Defendant could have obtained these books under subpoena, but was not entitled to shut out plaintiff's testimony as to the receipts from his business because of their non-production. The case of *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, is in nowise to the contrary; nor is that of *Bartow v. Erie Railroad Co.*, 73 *Id.* 12, where the absence of plaintiff's books was commented on in connection with the total absence of evidence of the cost of conducting his business. In *Standard Amusement Co. v. Champion*, 76 *Id.* 771, 774, the books were held admissible because as between the parties they partook of the nature of partnership accounts. In the very recent case of *Rabinowitz v. Hawthorne*, 89 *Id.* 308, the discussion was not as to the exclusiveness or admissibility of the books, for there were none, but as to the general competency of evidence to show the average profits of plaintiff in his business.

We may add that plaintiff was again put on the stand and then testified that the "books" were only the collected sales slips that had been sent him from time to time by the commission merchants; and that these were the only record he had.

Lastly, it is urged that the court should have granted the motion to nonsuit, on the double ground (a) that plaintiff had failed to show any warranty, or (b) any breach thereof. There was evidence of a sale by description, which raised an implied warranty that the goods were "crude fish" (*Comp. Stat.*, p. 4650, § 15); and evidence that in fact they were not.

The nonsuit was properly denied. If it be conceded that the evidence for plaintiff failed to indicate that what he received was not in fact "crude fish," this was supplied by the

90 N. J. L. Swiller v. Home Insurance Co. of N. Y.

testimony offered for defendant, and the error, if any, cured. *Bostwick v. Willett*, 72 N. J. L. 21; *VanNess v. North Jersey Street Railway Co.*, 77 Id. 551; *Dennery v. Great Atlantic and Pacific Tea Co.*, 82 Id. 517.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—BLACK, HEPPENHEIMER, JJ. 2.

MAX AND ABE SWILLER, PARTNERS, ETC., ET AL., RESPONDENTS, v. HOME INSURANCE COMPANY OF NEW YORK, APPELLANT.

Submitted December 11, 1916—Decided March 5, 1917.

The endorsement by an insurer on a fire insurance policy, of consent to change of ownership in the property insured, without more, is not to be construed as an agreement by the company to become liable to the new owner for a loss occurring after the ownership actually changed but before the consent was given.

On appeal from the Supreme Court.

For the appellant, *Russell E. Watson*.

For the respondents, *John P. Kirkpatrick*.

The opinion of the court was delivered by

PARKER, J. The suit is to recover loss by fire which plaintiffs claimed to be covered by a policy issued by the defendant company.

Swiller v. Home Insurance Co. of N. Y.90 N. J. L.

The policy was issued in the names of Max Herman and Wolfe Fisher, as their respective interests might appear, for a term of one year from October 8th, 1912.

On February 14th, about three P. M., Fisher and Gottlieb delivered a deed conveying the property to the two Swillers, the present plaintiffs, who also received the written policy, and about four P. M., of the same day, they gave it to their insurance broker, named Levine, with directions to have the ownership transferred to their names. Levine was not the agent of the company. That agent was a corporation named Neilson T. Parker, Inc. Levine did not go to Parker for an endorsement of change of interest until the next morning when the endorsement was made. In the meantime, the fire had occurred. The stipulation of facts shows that when Levine presented the policy for endorsement of new ownership, neither Parker, Inc., nor the company knew of the fire having taken place, and Levine did not inform Parker of it.

On this state of facts the trial judge, sitting without jury, held that, although in his estimation the policy was not originally enforceable because Fisher had no interest in the property at the time of its issue, or thereafter, yet plaintiffs were entitled to recover, on the theory, as he stated it, that the question was not one of waiver of the invalidity of the original policy, but of practically new insurance; and that instead of writing a new policy for the remaining portion of the policy (term?) the company extended the old insurance to the new owners.

We think that this was error. It may be conceded that by endorsing the new ownership on a policy which the company could have voided for misstatement of original ownership, or for transfer of ownership to the Swillers without such endorsement, the company entered into a fresh contract with said new owners to insure them for the remainder of the term, and that the premium originally paid was a valid consideration therefor. But when did the remainder of the term begin? In order to uphold the decision below, it is necessary to say that it began when the deed to the Swillers was delivered. Doubtless, the company could have so agreed, but

the question is, What agreement did it actually make by the endorsement? The only reasonable answer, as it appears to us, is, that in the absence of some special stipulation the insurer's consent to change of ownership must be construed as operating to protect the new owner from the time it is given; and that time is ordinarily when it is affixed by the company or its authorized agent, and that it does not relate back to any prior time when the ownership in fact changed, or, in other words, that the insurer does not, by assenting to the change of ownership, assume the liability for a loss occurring before that consent was given, of which it knew nothing, and for which, as the policy stood without its consent, it was not liable.

The case is not within the rule in *Hallock v. Insurance Company*, 26 N. J. L. 268; 27 *Id.* 645, for, in that case, the application was made for insurance and premium tendered to the agent before the fire occurred, for a term to begin at the date of the application, and the policy was so written. There was, consequently, in that case, no room for argument as to what the company agreed to, and the main question was whether it was relieved from the agreement because the fire had occurred without its knowledge before it had formally entered into it.

One of the defences set up in the pleadings, and not contradicted as to the facts, was that the policy contained a provision that unless otherwise provided by agreement endorsed thereon or added thereto, it should be void if any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance, &c., and that by the conveyance to the Swillers such change took place and vitiated the policy. On the trial defendant requested the court to find that the foregoing clause was a warranty, of which there had been a breach by the conveyance to the Swillers which had not been waived by an endorsement on the policy or addition thereto; and further, that the endorsement in question, placed on the policy after the fire, did not constitute such waiver because the company had no knowledge or notice of such fire. These requests were either overruled

Swiller v. Home Insurance Co. of N. Y.

90 N. J. L.

or confessed and avoided by the decision placing the judgment upon the ground, not of waiver, but of new insurance. As the case stands before us, defendant is entitled to attack both the refusals of the court and its specific findings of law injurious to defendant. It is not necessary to pass upon the question whether by the language of the policy insuring Herman and Fisher as their respective interests appeared, the policy, though void as to Fisher, would be good as to Herman. It might even be conceded for the sake of argument that they might have recovered for the loss. The simple question before us is, Was the company under a contractual liability to the Swillers for a loss after title vested in them, and before the endorsement of change of ownership? The trial court held that it had agreed to such liability by its endorsement made after the fire and without knowledge thereof. This we consider erroneous, for reasons already stated; and for this error the judgment must be reversed.

BERGEN, J. (dissenting). I am unable to agree with the majority of the court that the refusal of the trial court to find as requested, that the endorsement entered on the policy on February 15th, 1913, which reads as follows: "Interest in this policy is hereby vested in Max and Abe Swiller, trading under the name of Swiller Bros. as owner instead of as heretofore. Loss, if any, first payable as before. Second mortgagee eliminated," was not a waiver of previous breaches of warranty as to ownership, called to the attention of the court, because the company had no notice of the facts alleged to avoid the insurance and forfeit the policy, was erroneous.

This request is based upon the assumption that the policy, before it was assigned to the plaintiffs and the endorsement made thereon, was absolutely void, because when it was issued to the previous owners, Max Herman and Wolfe Fisher, the latter had conveyed his undivided one-half interest to Nathan Gottlieb. The policy of insurance is not printed in the record, nor was it submitted to the court, the case being tried and determined upon facts stipulated, so we have no knowledge of the terms of the policy, relating to the character of the in-

terests insured, except as they appear in the stipulation, the first of which is that on October 8th, 1912, the defendant issued a Standard fire insurance policy "to Max Herman and Wolfe Fisher, *as their respective interests appear*, for the term of one year from the 8th day of October, 1912, at noon, to the 8th day of October, 1913, at noon." As I read this policy it is an insurance against loss of the respective interests of each, and not of their joint interest, and there is no reason why the insurance company could not lawfully contract, as they did, to insure either against loss, so far as their respective interests appeared, and, if so, each had an undivided interest insured. If Fisher had no interest, all the company insured was the interest of Herman, which interest remained insured until he conveyed it to the plaintiffs, and so long as he retained that interest his mortgagee, Augusta McGinnis, one of the plaintiffs, was protected to the extent of his insurable interest by reason of the endorsement making any loss first payable to her as mortgagee.

None of the conditions contained in the policy upon which the breaches of warranty appearing in the requests to charge or find appear in this record, but, assuming that the policy contained these warranties, there was no breach, so far as the interest of Herman is concerned, because his respective interest was always in existence, and continued to be until he conveyed the property and handed over the policy to the new owner, for "respective interests" means such interests as each of the insured had. It is not a case where tenants in common are jointly insured where conveyance by one would avoid the policy, but an insurance of the respective interests of each as such interest might appear, and therefore there was no breach of warranty, so far as Herman was concerned, which called for a compliance with the sixth request that the endorsement did not constitute a waiver of the breaches of warranties, because one of the parties held a valid insurance to the extent of his interest. The effect of the new contract created by the endorsement on the policy, after the conveyance by Herman and after the loss, is not raised by any request to charge and is not to be considered because all of the

Swiller v. Home Insurance Co. of N. Y.90 N. J. L.

requests are based upon the theory that the entire policy was void from its inception because Fisher was not one of the owners when the policy was issued, and therefore the very interesting question how much of the period of the time stated in the policy it was to cover inures to the assignee when the entire policy is assigned and consented to by the insurance company is not before us.

If it is a new contract based upon all the terms and conditions of the policy, as seems to be the settled law, it may be that the insurance company, by the substitution of a new owner for the old one, makes the policy good to the new owner for the entire period, which would be nothing more than an agreement to insure the new owner for the entire period covered by the policy, or at least from the time it was assigned to him, and that the company has a right to antedate its policy was settled in *Hallock v. Insurance Company, supra*. But no such question is raised in this case, for all of the requests, the refusal to comply with which is the only ground of error alleged, are based upon the claim that the policy being originally void, the endorsement to the new owner was not a waiver of alleged breaches, because the policy itself was void, and if, as I think, the policy was not void because it was an insurance of respective interests, one of which was insurable, then the requests were based upon a false assumption of law and were properly refused.

The judgment should be affirmed.

For affirmance—THE CHANCELLOR, BERGEN, MINTURN, KALISCH, WHITE, WILLIAMS, JJ. 6.

For reversal—THE CHIEF JUSTICE, SWAYZE, TRENCHARD, PARKER, HEPPENHEIMER, TAYLOR, GARDNER, JJ. 7.

90 N. J. L.Collins v. Central R. R. Co. of N. J.

ANDREW J. COLLINS, RESPONDENT, v. THE CENTRAL
RAILROAD COMPANY OF NEW JERSEY, APPELLANT.

Argued March 22, 1917—Decided June 18, 1917.

1. In a case where the defendant was charged with negligence because of defective premises, an instruction to a jury "That if the defendant company had, *at any time*, before the accident, either knowledge or notice of a dangerous condition of its premises, it would have been negligence on the part of the company *not* to have remedied this condition," is erroneous, because the defendant is entitled to a reasonable time to inspect, discover and repair such defect. "At any time before the accident" includes immediately prior.
2. An erroneous instruction is not cured by a subsequent correct one, unless the illegal one is withdrawn.

On appeal from the Essex County Circuit Court.For the respondent, *C. Herbert Walker*.For the appellant, *Charles E. Miller*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff was lawfully in the freight station of defendant at Newark, N. J., for the purpose of moving some bags of manure. After he had taken one and was returning for another, an iron radiator fell on him and inflicted injuries for which he brings this action.

It is not necessary to determine whether any negligence of defendant was shown, because this judgment must be reversed for error in the charge of the court, which was as follows: "If the defendant company had, at any time before the accident, either knowledge or notice of a dangerous condition of its premises it would have been negligence on the part of the company not to have remedied this condition." "At any time before the accident" includes immediately before, and under our cases defendant was entitled to a reasonable time within which to inspect, discover and repair the defective condition

Gross v. Com. Cas. Ins. Co. of Newark, N. J. 90 N. J. L.

if it existed. *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558. All that is required is reasonable care and ordinary prudence. *Ruane v. Erie Railroad Co.*, 83 *Id.* 423.

The fact that the court subsequently charged the correct rule, if he did as is claimed, does not cure the trouble, for as Mr. Justice Parker said in *State v. Tapack*, 78 N. J. L. 208, "The rule is well settled that an erroneous instruction, followed or accompanied by a correct one is not cured by the latter unless it is also expressly withdrawn, as the jury is left at liberty to adopt either."

The judgment is reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

RUDOLPH GROSS, RESPONDENT, v. COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK, NEW JERSEY, APPELLANT.

Argued March 19, 1917—Decided June 18, 1917.

An insurance company, by its policy, contracted to pay the assured a weekly indemnity so long as he should be totally disabled and wholly and continuously prevented from performing any and every kind of business relating to his occupation. The business of the assured was that of a traveling salesman, which required a constant use of his feet, and during the term of the policy he was afflicted with a foot ailment which entirely prevented him from traveling and soliciting business, although during part of the term for which he claimed indemnity he was able to go to the office of his employer and conduct some business by writing letters and the use of the telephone. The trial court instructed the jury that the reasonable construction to be put upon the language used was, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, but that if he be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation, he was entitled to recover. *Held*, that such an instruction was not error.

90 N. J. L. Gross v. Com. Cas. Ins. Co. of Newark, N. J.

On appeal from the Essex County Circuit Court.

For the appellant, *William M. Holmwood* and *Edward L. Katzenbach*.

For the respondent, *Jacob L. Newman*.

The opinion of the court was delivered by

BERGEN, J. The plaintiff brought his action to recover on a policy issued to him by the appellant, assuring him certain payments in case of death or disability resulting from bodily injuries effected solely through accidental means, and it provided that if by reason of disease or illness, contracted during the term of this insurance by the assured, he be totally disabled, and "wholly and continuously prevented from performing any and every kind of business pertaining to his occupation and necessarily confined in the house," he should be paid as for total disability, "and if, immediately following such a period of total disability and confinement in the house, he shall be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, three-fourths of said amount per week shall be paid to the assured."

The plaintiff recovered a judgment from which the defendant has appealed.

This appeal presents two questions—*first*, is the plaintiff entitled to recover, and *second*, if entitled to recover, was the jury improperly instructed as to the extent of disability required by the policy?

The first was raised by motions to nonsuit and for a direction in favor of the defendant, and the second by an objection noted to the instructions given to the jury. The solution of the first question favorably to the appellant depends upon a determination that the policy was invalidated because of a breach by the plaintiff of certain written warranties made by him, and made a part of the policy which was issued on October 11th, 1911, and contained among other warranties the

Gross v. Com. Cas. Ins. Co. of Newark, N. J. 90 N. J. L.

following: "I have not been disabled nor have I received any medical or surgical attention during the past five years except as follows: In 1911 for *eczema*, lasting four months," and "My habits of life are correct and temperate; my hearing and vision are not impaired; I am in sound condition mentally and physically; except as herein stated: No exceptions." This policy expired October 1st, 1912, and was renewed each year thereafter, the last being from October 1st, 1914, to October 1st, 1915. The renewals were manifested by a certificate continuing in force the original policy. "Provided the statement in the schedule of warranties in the original contracts are true on this date and that nothing exists on the date hereof to render the hazard of the risk greater than or different than that shown by such schedule."

The testimony permits an inference that previous to the issuing of the last certificate the plaintiff had called upon a physician because, as plaintiff testified, he "got so easily tired in my feet, I went down there to consult, because he once treated me before, about a few years ago. * * * I went down there and he looked me over, he did not say anything. He said, 'You go home and take a little more care and take a little rest and rub your feet with alcohol.'

"Q. He did not tell you anything was the matter with you?

"A. No.

"Q. And you had no trouble after that until this last illness?

"A. Yes."

This he testified happened six months or a year prior to the last renewal. As this branch of the case rests upon the motions to nonsuit and for direction of a verdict, the foregoing testimony must be taken as true, and the question is whether this testimony conclusively established the fact that when the last renewal certificate was issued the plaintiff's warranty that he had "not been disabled nor have I received medical or surgical attention during the past five years," was untrue and therefore a breach of the warranty within the meaning of the policy, and also whether his condition made "the hazard of the risk different or greater than that shown by such schedule." The plaintiff's business required him to be on his feet most of

90 N. J. L. Gross v. Com. Cas. Ins. Co. of Newark, N. J.

the time, and finding that he tired easily, he went to the physician and represented his condition, but was not informed by him that he had any illness; was simply told to bathe his feet in alcohol. We do not consider this receiving medical attention of such a character as to require the plaintiff to state it to the defendant on the renewal, or that not doing so would invalidate the policy. Neither the physician or the plaintiff had any idea that the symptoms might be an indication of the ailment which subsequently developed, or that it was a disease or sickness. Advising one to bathe his feet in alcohol simply because they are tired is not conclusive evidence that the plaintiff had received medical or surgical attention sufficient to forfeit the policy, because it had not been made known to the defendant any more than if the ailment was temporary, such as an ordinary cold. Whether the plaintiff had knowledge that his condition was such that the hazard of the risk was different or greater than that shown by the schedule of warranties was a jury question. The court submitted to the jury the question whether the ailment was of so serious a character as to permanently affect his health and to make him a less desirable risk, and directed them that if they found in the affirmative then there could be no recovery. It was not error for the court to refuse to nonsuit, or to direct for the defendant, for the reasons urged.

The second branch of the case depends upon the construction to be given to the following part of the policy: "If, immediately following such a period of total disability and confinement in the house he shall be totally disabled and wholly and continuously prevented from performing *any and every kind* of business pertaining to his occupation, but is not necessarily confined to the house, three-fourths of the said amount for the week will be paid to the assured."

The trial court instructed the jury that the reasonable construction to be put upon the language used was, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, but that if he be so disabled as to prevent him from doing any and every kind

Gross v. Com. Cas. Ins. Co. of Newark, N. J. 90 N. J. L.

of business pertaining to his occupation, he was entitled to recover.

The proofs show that the occupation of the plaintiff was traveling for his employer from Newark, N. J., to New York, Boston, Philadelphia and other places, to sell and buy leather and hides and attend to the shipments; that he sometimes did office work, calling people on the telephone and dictating letters concerning business growing out of his traveling; that from January 4th, 1915, to the 15th of October following he was not able to do any traveling because of a severe and persistent ailment affecting his feet; they were so swollen that he could not wear his shoes until nearly the end of the period when he was able to wear a special shoe made for his use; he would go to the office with an automobile and while there occasionally dictated a letter, the proofs showing that during the entire period he dictated about eighty letters but that he did not do his regular work. We think that the instruction of the trial court was right. The indemnity contained in the policy included any and every kind of work appertaining to his occupation, not a part of his work, but any and every kind, and the policy makes the distinction between the total disability, which confined him to the house, and the disability to do every kind of work pertaining to his occupation after he was able to go out of the house, and provided a lower rate for the latter disability.

In *Young v. Travelers Insurance Co.*, 13 Atl. Rep. 896, the Supreme Court of Maine dealt with a policy which had in it this clause: "And wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured." In that case the trial court instructed the jury that the meaning of this language was not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation or to any part of his business, but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation, and that there was a difference between being able to perform any part, and any and every kind of business, and the appellate court sustained

90 N. J. L. Gross v. Com. Cas. Ins. Co. of Newark, N. J.

this instruction to the jury. "If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform only one, he was as effectually disabled from performing his business as if he could do nothing required to be done."

In *Hooper v. Accidental Death Insurance Co.*, 5 Hurlst. & N. 546, where the plaintiff was an attorney, he sprained his foot while riding on horseback, and the claim by the insurance company was that it did not wholly disable him. In that case the covenant was that if the injury be of "so serious a nature as to wholly disable him from following his usual business, occupation, or pursuits," the company would pay, and the court held, "If a man is so incapacitated from following his usual business, occupation or pursuits as to be unable to do so, he is 'wholly disabled' from following them. His 'usual business and occupation' embrace the whole scope and compass of his mode of getting his livelihood. * * * They intended that when the insured was wholly incapable of performing a very considerable part of his usual business, he should receive a compensation in respect of that disablement."

In construing a policy we should adopt the meaning of the words used most advantageous to the assured, and in the present case the indemnity runs during such period as the insured is disabled to perform any and every kind of his occupation. The proofs show sufficiently for the jury to so infer, that the principal part of the occupation of the insured was traveling, in which the use of his feet were absolutely necessary, and because of his peculiar illness he was disabled from performing the principal and major part of his occupation.

We see no error in this record, and think the judgment should be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, TAYLOR, GARDNER, J.J. 11.

For reversal—None.

Limpert Bros. v. French & Son.90 N. J. L.

LIMPERT BROTHERS, INCORPORATED, APPELLANT, v. R.
M. FRENCH & SON ET AL., RESPONDENTS.

Argued March 16, 1917—Decided June 18, 1917.

1. The respondents caused an attachment to be issued out of a court for the trial of small causes and under it the debtor's goods were seized; subsequently, but before judgment in the proceedings, the prosecutors, as they claim, issued an attachment out of the Circuit Court against the same debtor and under it the same goods were seized. *Held*, that if it appeared that prosecutor had in fact issued the attachment and seized the goods it had the same right that the debtor would have to move the justice court to quash the writ issued by that court, and to rescue the goods, on which it had a lien, from the prior seizure.
2. In support of such motion *ex parte* affidavits are not sufficient; the material facts must be proved before the justice, by the production of competent proof.
3. A stipulation of facts not submitted to the justice of the peace cannot be used on review by an appellate court.

On appeal from the Supreme Court.

For the appellant, *James O. Clark*.

For the respondents, *Augustus C. Nash* and *Winfield S. Angelman*.

The opinion of the court was delivered by

BERGEN, J. R. M. French & Son procured a writ of attachment to be issued out of a court for the trial of small causes and the officer seized the property of Clay & Tokis, trading as "Diana," the defendants in that proceeding. Subsequently, and before judgment therein, it is claimed by the present prosecutor that it caused to be issued a writ of attachment out of the Union County Circuit Court, under which the same property was attached by the sheriff. Thereafter, the prosecutor filed an affidavit with the justice of the peace and moved to quash the writ issued by him because the Christian names

of the defendants are not set forth in the affidavit or the attachment.

The affidavit and the writ described the defendants as "Clay & Tokis, partners trading and doing business as Diana," and the motion to quash was made in pursuance of a stipulation that it should be made in one case, there being other attachments of like nature, "for the purpose of establishing the validity of said attachment." The court, after argument, refused to quash the attachment and proceeded to hear the merits, rendering judgment for R. M. French & Son. The prosecutor then obtained a writ of *certiorari* to review the order of the court for the trial of small causes in refusing to quash, and the Supreme Court dismissed the writ upon the ground that the statute does not authorize a stranger to the record in that court to intervene by filing an affidavit of interest in the subject-matter of the litigation, and, therefore, the prosecutor had no legal status in the proceeding.

Assuming that it was properly proven before the justice that a writ of attachment had been issued out of the Circuit Court and the same goods seized under it, we are of the opinion that the conclusion of the Supreme Court was not sound in law, for it was held in *National Papeterie Co. v. Kinsey*, 54 N. J. L. 29, where a subsequent judgment creditor moved to quash a prior attachment that "the judgment creditors acquired the right of the judgment debtor in the property levied on, and had a right to rescue it for the satisfaction of their claims from any one who could not assert a superior title in the law to it. It is not perceived how the efficacy of the proceedings under the judgments can be impaired, or how validity can be imparted to attachment proceedings unauthorized by law, by the mere volition of the debtor as against the judgment creditors. The debtor may waive his own rights, but he cannot, surrender the rights of his judgment creditor." We are of opinion that an attachment vests in the attaching creditor the same right of rescue as if he were a judgment creditor, and that if the debtor has a right to move to quash an attachment in any court, his attaching creditor has the same right. He has a lien upon the property and stands in the place of the

Limpert Bros. v. French & Son.90 N. J. L.

debtor and if the debtor is entitled to have the writ quashed he cannot defeat the rights of his other creditors, having a lien, by consenting to the execution of a void attachment. The prosecutor's difficulty in this case arises over the method which it adopted in proceeding to quash the attachment, for while, as was said in *McLaughlin v. Cross*, 68 *Id.* 599, "the practice is quite general to afford relief against void judgments to any person interested," the method of relief in a case of this character seems to be prescribed by statute. Section 43 of the Attachment act provides that in all cases of an attachment issued by a justice of the peace, when an affidavit shall be filed by or on behalf of the defendant, setting forth facts which would render said attachment illegal or void, it shall be the duty of the justice upon a motion to quash to try the facts. In this case the prosecutor produced no witnesses but seems to have relied on the affidavit filed by him, and also the affidavit upon which the justice issued the writ, but it was held in *Morris v. Quick*, 45 *Id.* 308, that the *ex parte* affidavits of the moving party cannot be used on the motion but that he must sustain the burden by legal evidence, that the writ was illegally issued.

The original affidavit described the debtor as "Clay & Tokis, partners trading and doing business as Diana," and section 3 of the Attachment act provides that the writ may issue against the separate and joint estate of joint debtors "either by their names or the names of the partnership or by whatsoever name they may be generally distinguished." In the original affidavit the defendant is described as doing business under the name of Diana, and the prosecutor offered no proof that this was not correct.

Nor did the prosecutor make any legal proof before the justice of the peace that any attachment had been issued out of the Circuit Court and the debtor's goods attached under it.

Without this there was nothing before the justice to show that the prosecutor had any interest in the goods to be rescued for its benefit. The stipulation between the parties, from which an inference, it is claimed, may be drawn that there was such a writ of attachment was not submitted to

90 N. J. L.

Michael v. Minchin.

the justice, and his record as returned, to correct which no attempt has been made, certifies that "This court has no knowledge except the statements of the attorney that a writ of attachment has been issued out of the Union County Circuit Court. If a writ affecting these proceedings has been issued, superseding or affecting this jurisdiction, this court has not been officially so informed." Under the facts before the justice he correctly disposed of the motion.

For the reasons given the judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

MARY F. K. MICHAEL, RESPONDENT, v. HARRY W. MINCHIN, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

The testator devised to his wife for life his real estate and after her death to his three children, each a distinct parcel specifically described, subject, among others, to this proviso: "In Case my Son Harry W. Minchin Should depart this life without Issue His Share will go to my Dauter Emma Jane Minchin;" Harry survived the life tenant and Emma died during the life tenancy, leaving a child. The life tenant conveyed to Harry all her interest in the lands devised to him. *Held*, that Harry having survived the life tenant and the executory devisee, Emma, his estate in the land devised to him became absolute for two reasons—(a) because the words "depart this life without issue" were properly referable to the death of the life tenant and not to the devisee, applying *Patterson v. Madden*, 54 N. J. Eq. 714; (b) that by the death of the executory devisee, Emma, in the lifetime of Harry, the gift over became impossible of performance, and that the estate of Harry, the first taker, became absolute, applying *Den v. Schenck*, 8 N. J. L. 29, and *Drummond's Executor v. Drummond*, 26 N. J. Eq. 234.

Michael v. Minchin.90 N. J. L.

On appeal from the Essex County Circuit Court.

George Minchin died leaving a last will and testament in which, by the first paragraph, he devised to his wife for life his real estate, and at her death to his three children, Harry, Emma and Adeline, each a distinct parcel specifically described, and to his son Abraham \$3,000, subject to the following conditions:

“Should death take my Dauter Addeline or She do not have anny Issue Children living at her death her Part will be divided between my Son Harry W. Minchin and my dauter Emma Jane Minchin in Case my Son Harry W. Minchin Should depart this life without Issue ‘His Share will go to my Dauter Emma Jane Minchin if Emma Should depart this life without (Issue Children) her Share Should go to my Son Harry W. Minchin in Case of my (three 3) last mentioned children depart this life without Issue then the whole Shall go to my Son Abraham C. Minchin.

“Second—I leave to my wife Mary Jane my life Insurance Poliseys and when Paid She Should Pay my Son Abraham C. Minchin his Share \$3000.00/100 out of it besides in Say Sixty days after or as can be done I leave my Wife Mary Jane all My Personal Property for her lifetime and at her death it Shall go to my Son Harry W. Minchin if alive and if not alive to my Dauter Emma Jane and is not alive to my Dauter Addie L. La Bough and if She is dead to my Son Abraham C. Minchin but at anny time during my wife life if She wish she can give to my son Harry or my Dauter Emma anny or all Parts of what was left to them besides She is to Seport them untill the are of age in as good a way as it will Alow I diret my Exections to Pay all my lawful deaths.”

The testator left him surviving his widow and the four children mentioned in the will, which was probated August 8th, 1892. The widow is dead, and of her children three died in her lifetime, Abraham without issue and Adeline and Emma leaving issue; Harry is still alive and has two children living.

90 N. J. L.Michael v. Minchin.

The widow conveyed her life estate in the land devised to Harry, to him, and he and his wife conveyed the land, the subject of this suit, to the plaintiff by a deed containing a special covenant of seizin in fee-simple, and the plaintiff brought this action to recover damages for an alleged breach of that covenant because, as she claims, Harry has not an indefeasible estate, but one that is subject to the gift over to Emma if he should die at any time without leaving issue.

For the appellant, *Arthur H. Mitchell*.

For the respondent, *Lum, Tambllyn & Colyer*.

The opinion of the court was delivered by

BERGEN, J. Upon the foregoing facts the trial court held, a jury being waived, that the estate of Harry was a fee-simple, subject to a defeat upon his death at any time without issue, in which event the executory devise over to his sister Emma J. Minchin, who died in his lifetime, vested in her heirs or devisees, and that Harry's estate remained defeasible until after his death leaving issue, and ordered judgment entered for the plaintiff, from which the defendant has appealed.

The result reached by the court below is erroneous, for reasons to be stated. The trial court disposed of the case without at all considering the effect of the intervention of the life estate of the widow, and the postponement of the right of possession of Harry until after the death of the life tenant.

Passing for the present the consideration of the question concerning the character of the estate which Emma took under this will if she died before Harry, to be hereinafter dealt with, and assuming that there are two gifts after the life estate, one to Harry, defeasible upon his death at any time without issue, and another, the remainder, to his sister Emma in that event, the limitation over. in such case, will be referred either to the death of the first devisee, or of the life tenant, as the court may determine from all the provisions of the will, because it should be so construed as to give effect to the intent of the testator ascertainable from his will.

Michael v. Minchin.

90 N. J. L.

In the present case, the will should be so construed as to refer the death of Harry without issue, to death in the lifetime of the life tenant. "Where the two concurrent or alternative gifts are preceded by a life, or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question (depart this life without issue) to the event of death occurring before the period of possession or distribution." 3 *Jarm. Wills* 648.

In *Paterson v. Madden*, 54 N. J. Eq. 714, 723, Chief Justice Gummere, in a well-considered opinion read for this court, declared that two rules are established in this state, in the construction of wills containing a limitation over by way of an executory devise after the death of the original devisee without issue, and they are stated by him as follows:

"*First*. If land be devised to A in fee and a subsequent clause in the will limits such land over to designated persons in case A dies without issue, and A so dies, and the substituted devisees are *in esse* at his death, and there is no other event expressed in the will to which the limitation over can fairly be referred, then A takes a vested fee which becomes divested at his death and vests in those to whom the estate is limited over.

"*Second*. Where there is an event indicated in the will other than the death of the devisee to which the limitation over is referable (for instance, the distribution of the testator's estate or the postponement of the enjoyment of the property devised until the devisee reaches the age of twenty-one or until the exhaustion of a prior life estate), such limitation over will be construed to refer to the happening of such event or to the death of the devisee, according as the court may determine from the context of the will and the other provisions thereof, that the limitation clause is set in opposition to the event specified or is connected with the devise itself."

It will be observed that under the first rule the substituted devisees must be *in esse* at the death of the first taker, which is not the condition in the case under consideration, for here

90 N. J. L.

Michael v. Minchin.

the executory devisee died in the lifetime of the first taker and during the existence of the life estate.

In the Paterson case the will gave certain farms to his four sons upon condition that neither of the farms should be sold by his sons during the lifetime of his wife, with a proviso that if either should die without lawful issue, the widow of the one dying should have the use of the farm given to the son so long as she remained unmarried, and on her marriage or decease, over to his lawful heirs, and it was there held that the limitation over stood, not in opposition to the devise, but to the event of the devisees coming into possession, and that the limitation over became operative only in case the prior devisee died without issue before the death of his mother, and the case of *Williamson v. Chamberlain*, 10 N. J. Eq. 373, was cited as an example of the application of the second rule. In that case there was a gift of a life estate to a wife in real and personal property with remainder to his children, upon condition that if any of his children should die without lawful issue, his or her share should be divided between the survivors, and it was held that the limitation over stood, not in opposition to the devise, but to the distribution to the children after the death of the wife, and that the limitation over was defeated by the death of the mother during the lifetime of the children. Under the cases referred to, supported by numerous citations not necessary to be here repeated, the present will should be construed to mean that testator intended, if Harry survived his mother his estate should become absolute, for the words "should depart this life without issue," are properly referable to death without issue during the life tenancy. This interpretation of the intent of the testator is aided by the second paragraph of the will where the personal estate is given to the widow for life and at her death to Harry, if alive, and if not alive, to Emma, "but at anny time during my wife life if She wish She can give to my Son Harry or my Dauter Emma anny or all Parts of what was left to them." This will was, evidently, drawn by an illiterate person, and is crudely expressed, but it is reasonably subject to interpretation that the wife was author-

Michael v. Minchin.90 N. J. L.

ized to turn over to Harry any part of what was left him by the will when he came of age, for until that period the wife was required to support him in "as good a way" as his share would allow.

That the power of appointment given to the wife, to be exercised at any time she might wish, was not intended to be limited to the personal estate, may be inferred from the fact that Emma is given no part of the personal estate unless she was alive at her brother's death, and therefore the gift to Emma of all part of what was left her, if the life tenant so wished, would be without meaning unless it referred to something that had been left to, and which could be advanced to, her, and so, when the wife exercised her power of appointment by conveying to Harry the land that was left to him, she accelerated, as she had a right to do, the period of distribution as to Harry, but whether this be so or not, we have no doubt that the testator intended Harry to have his share, if he survived his mother, and that the executory devise to Emma was dependent upon his death without issue in the lifetime of his mother, and as he survived her his estate became absolute.

The trial court was also in error in holding that notwithstanding the death of Emma, the executory devisee, in the lifetime of her brother Harry, she had an estate which passed to her child, and that the child will take the land, by inheritance from her mother if Harry should at any time die without issue. The gift to Emma was a personal one, there being no gift over in case of her death. Under the common law she would have taken a life estate, but by virtue of our statute concerning wills (*Comp. Stat.*, p. 5873, § 36) her estate becomes absolute if the prior estate fails by death of Harry without issue, if she be *in esse*, and the situation is the same as if the devise over to her was absolute, so her children can only take by inheritance from her and not by purchase under the will, for there is no gift to her children or legal representatives.

By the death of Emma before the gift over to her took effect, the object of such gift was not in existence, and there-

fore it became impossible of performance. In such case the prior estate becomes absolute in the first devisee. In *Den v. Schenck*, 8 N. J. L. 29, the testator gave to his son Gilbert and his two daughters each a parcel of land with the proviso "that if any of my children should happen to die without any issue, that such share or dividend shall be divided by the survivors of them." Of the daughters, one died without issue, and another, Hannah, died during the lifetime of Gilbert, who, subsequently, died without issue. Hannah left children, and after the death of Gilbert, who had conveyed to the defendant Schenck, Hannah's children brought an ejectment suit based upon the claim that their mother had an inheritable estate which passed to her heirs at the death of Gilbert without issue. The court held that Gilbert took an estate in fee, subject to defeasance upon the happening of two events, death without issue and the survival of the sisters, and said: "When his two sisters died it became impossible that the estate should be defeated by going over to survivors when there were none; from that time it became an absolute fee-simple in Gilbert."

In that case it will be observed there were children of Hannah claiming an inheritance from her, property she would have taken if she had survived Gilbert, he dying without issue.

The rule laid down in that case is that where there is a gift over and it becomes impossible of performance through the death of its object, nothing more being present, the estate of the first taker becomes absolute. The statute making an estate absolute where the words "heirs and assigns" are omitted, and where there is no expression in the will whereby it shall appear that it was intended to convey only a life estate, as it now appears in our statute relating to wills, section 36, was then in force, it having been passed August 26th, 1784, and was not in *Den v. Schenck*, *supra*, considered as vesting an inheritable estate in executory devisees if they did not survive the first taker. That case was decided in 1824, and has been uniformly recognized by our courts as establishing in this state the legal rule, that where there is a

Michael v. Minchin.

90 N. J. L.

gift to one, and then over to another if the first taker dies without issue, the executory devisee must be alive to take at the termination of the prior estate, and in default of the existence of the object of the gift over, the prior estate becomes absolute. *Groves v. Cox*, 40 N. J. L. 40, 45.

This rule was adopted and applied by Chancellor Runyon in *Drummond's Executor v. Drummond*, 26 N. J. Eq. 234, where the gift was to testator's adopted daughter "when she arrives at full age," and if she should die without leaving lawful issue, then to his nephew. The daughter lived to come of age and the nephew predeceased the testator. The children of the nephew claimed that the daughter only took an estate defeasible in the event of her death without issue at any time, and if that happened, they would be entitled as next of kin of their deceased father, but the Chancellor held that by the death of the nephew the estate of the daughter became absolute, saying: "The provision made in the contingency of her dying without leaving lawful issue, was made expressly for another object of his bounty whom he desired and intended to benefit in that event, that object had ceased to exist, and the provision, therefore, was at an end and the primary gift was left wholly unaffected by it. The testator did not provide that Jane should have a life estate merely, and that after her death the property should go to her children, if she should leave any, but he gives the property to her without qualification in the gift. The principle of the rule that, where there is an estate in fee liable to be defeated on a condition subsequent, and that condition originally was, or by matters subsequent, has become impossible to be performed, the defeasible estate is made absolute (*Co. Litt.* 206a). applies to this case, for the estate was made liable to be defeated by a gift over, which could never, by possibility take effect, and the primary gift, therefore, is the same as if there were no provision for its defeasance." The trial court refused to apply this case because the nephew died in the lifetime of the testator, apparently overlooking the declaration of the Chancellor that the rule applied when the condition "originally was, or, by a *matter subsequent*," became im-

possible of performance. The court below also refused to apply *Den v. Schenck*, *supra*, upon the ground that the gift over was to survivors of testator's children, and that in the will now under consideration there is nothing to indicate an intention that the share of his son Harry should go to his sister Emma only in the event that she should survive him, but this begs the question for it assumes that under a proper construction of this will, Emma took an indefeasible estate after the death at any time of Harry, even if she did not survive him, which is the very matter in dispute. Nor is there any force in the notion expressed by the trial court that there is a distinction between an executory bequest to the survivors of a class of devisees and one to a single devisee, because the word "survivors," when so used, merely describes the object or objects who are to take the gift over because in existence when the prior devise fails, which may be one or more persons.

As the court below relies to some extent upon the case of *Seddel v. Wills*, 20 N. J. L. 223, and quotes at some length from it to sustain its conclusion that although Emma died before her brother Harry, the estate given her vested in her heirs or devisees, if Harry thereafter died without leaving issue, a short analysis of that case seems to be required.

The facts in that case, pertinent to the present occasion, are these: The testator had three sons and six daughters and one grandchild, and devised to each of his sons and daughters a specific tract of land, and to his granddaughter a money legacy. He then provided that if either of his children should die without lawful issue, the land devised to them should be equally divided between his surviving children. Two of the daughters died without leaving issue; the three sons died leaving issue, two of them before both of their sisters and the other after the death of one, and before the death of the other sister, another daughter died after her two sisters, leaving issue, and the three other daughters and the granddaughter named in the will were still alive.

Chief Justice Hornblower, in determining the respective interests of the granddaughter named in the will and of tes-

Michael v. Minchin.

90 N. J. L.

tator's other grandchildren, the issue of his three sons, states two possible constructions of the will depending upon whether the devise over was to *all his other children* or only to such of them as should actually survive the one dying without issue, and then said: "Upon the supposition, that the devise over was to all his other children, then, immediately upon testator's death, they each become seized of, or entitled to, an executory devise in fee in each other's lands, subject to be defeated upon the others leaving issue at the time of their death; and, consequently, if one died leaving issue after the testator, but before the death of a brother or sister without issue, the issue of the one so first dying would take a share of the land of the one dying without issue; not as devisees of the testator, nor yet as heirs of the one dying without issue, but as heirs-at-law of his or her deceased father or mother, although such deceased father or mother did not die seized of the land in possession, but seized only of the executory interest or estate." It is upon this citation that the trial court rested its decision, but Chief Justice Hornblower did not construe "my surviving sons and daughters" to mean all his other children, for, following the statement above quoted, which applied to "the supposition that the devise over was to *all his other children*," he said: "I was at first inclined to adopt this view of the case; but, upon further reflection, and upon looking at the whole scope and tenor of this will, I think it is not necessary to depart from the plain common sense and grammatical meaning of the language of the testator. There is nothing in the will to indicate any intention in the testator that the children of a deceased child, whether dying before or after him, should stand in *loco parentis*; nor any necessity to adopt such a construction for the purpose of effectuating any manifest intention of the testator, or satisfying the rules of the law.

"On the contrary, the peculiarity of the devise to the three sons, and the limitation over only of what he devised to Samuel and Thomas, and the substitution of a mere legacy to his granddaughter Rebecca, in the place of real estate which the testator originally intended to give to her mother,

90 N. J. L.

Michael v. Minchin.

show that the grandchildren were not viewed or thought of by him as immediate objects of his bounty in respect to his real estate," and he determined that upon the death of the two daughters without issue, the land devised to them belonged by force of the will "to the brothers and sisters then actually living, to the exclusion of the children of the deceased brothers and sisters, and of the testator's granddaughter Rebecca," and that the surviving brothers and sisters took their respective shares in fee-simple and not contingent upon any future event. As one of the daughters survived her sister who died without issue, it was held that she, surviving her sister, became entitled to her share of the deceased sister's land in fee-simple. It thus appears that the construction relied upon by the trial court was not adopted by the Chief Justice in dealing with a condition similar to the one in this case, and the result which he reached affirmed the principle laid down by the court in *Den v. Schenck, supra*.

The result of the views above expressed is that the defendant's death without issue is referable to his death in the lifetime of the life tenant, and if he survived her his title became absolute, and also that the gift over failed by the death of Emma, in the lifetime of her brother Harry, because the object of the gift over, being removed, the executory devise became impossible of performance, and the prior estate became absolute, and in either event the defendant became seized of an indefeasible estate, and, therefore, there was no breach of the covenant, contained in his deed to the plaintiff, that he was seized of a fee-simple estate. This requires a reversal of the judgment under review and the awarding of a *venire de novo*, and it is so ordered.

For affirmance—None.

For reversal—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

Parkview B. & L. Ass'n of Newark v. Rose. 90 N. J. L.

**PARKVIEW BUILDING AND LOAN ASSOCIATION OF THE
CITY OF NEWARK, RESPONDENT, v. EDWIN E. ROSE,
APPELLANT.**

Submitted March 26, 1917—Decided June 18, 1917.

Where a building and loan association draws a check to pay matured shares on account of which a loan has been made and a note taken, expecting the shareholder to pay the note at the time of delivery of the check for the shares, and both note and check are placed in a safe to which the secretary of the association has lawful access, he being the principal officer transacting the financial business between the association and its shareholders, and authorized to receive all moneys paid to the association, and he, without express authority, takes the note and check from the safe, delivers the check to the shareholder, collects the money due on the note, surrenders it and embezzles the money, the loss must, as between two innocent parties fall on the one whose negligence made the fraud possible. Whether the circumstances in such a case amount to negligence is a jury question, and a directed verdict is error.

On appeal from a judgment entered on a verdict directed for plaintiff in the Essex County Circuit of the Supreme Court.

For the appellant, *Philip J. Schotland*.

For the respondent, *Riker & Riker*.

The opinion of the court was delivered by

BERGEN, J. This is an appeal from a judgment entered upon a verdict directed for the plaintiff, and the question to be decided is, Was such a direction warranted?

The facts are not in serious dispute. The plaintiff was an incorporated building and loan association, of which defendant was a shareholder, and from which he borrowed \$1,800 and gave his promissory note. When his shares matured they were worth \$2,000, and George Brown, Jr., plaintiff's secretary, notified defendant that the plaintiff would pay him the

90 N. J. L. Parkview B. & L. Ass'n of Newark v. Rose.

\$2,000 and that he should draw a check to Brown's order for the amount due on the note; this defendant did, and the note and certificate of shares was delivered to the defendant. Brown cashed the check and embezzled the money, and plaintiff brought this suit to recover the sum due on the note, in which action the court directed a verdict for the plaintiff. The constitution of the plaintiff association provides that the secretary "shall receive all moneys paid to the association and pay the same to the treasurer," and the evidence shows that the secretary did receive nearly, if not all, the moneys paid to the association for it. There was also testimony from which it may be inferred that Brown, as secretary, was entrusted with most of the financial transactions between the association and its members, the duties of the treasurer being confined to the receipt of moneys from the secretary and their disbursement; that in the present case, when, on two occasions, defendant borrowed money and gave his notes, the delivery of the checks and taking of the notes was done by Brown with the treasurer's knowledge and consent, and that, in fact, all of defendant's transactions with the association were had with Brown.

But the plaintiff claims that Brown had no authority to deliver the note and accept the moneys due thereon; that although the uniform course of business of the plaintiff was to pay in full matured shares, and to be paid in full by a borrower the debt due, when shares were pledged for a loan, the secretary had no power to make settlements of this kind as that was always done by the treasurer, and in accordance with that practice the check in this case was drawn for \$2,000 and placed in the safe of the plaintiff with defendant's note, to be delivered when defendant notified the treasurer of his desire to settle, when the latter would attend at his office for that purpose; but there is no proof that defendant had knowledge of this. It is admitted that Brown had lawful access to the safe, in common with the other officers, and there is proof that he was thus afforded an opportunity to do just what he did—take the note, deliver it to defendant and collect the amount due. That he accepted a check instead of cash is of no consequence,

Parkview B. & L. Ass'n of Newark v. Rose. 90 N. J. L.

for he could as readily embezzle the proceeds of the check as the cash.

We are of opinion that it was a jury question whether the plaintiff was not negligent in putting the check and note within the reach of Brown, the one officer with whom most, if not all, the financial transactions between the plaintiff and this defendant were carried on, and also whether the course of conduct pursued or acquiesced in by the plaintiff in permitting Brown to so act, was not a holding out of him as the financial agent of plaintiff with whom the defendant might safely deal. Brown collected all dues; he negotiated the loans with the defendant, first one for \$600 and delivered the check and took the note, and when the second loan was made, increasing the total to \$1,800, he delivered the check and took the note for \$1,800. From the evidence a jury might infer that when the note for \$1,800 was delivered to Brown to be given to the association, it was received by him as agent of the plaintiff; that Brown, through the negligence of the plaintiff, came into possession of the check and note; that he had always collected the interest on the loan and acted as the agent of the plaintiff in its ordinary financial dealings with shareholders; that he came to defendant with the check, note and shares in his possession, apparently authorized to make the settlement, and delivered them, collecting the amount due on the note, and that the possession by Brown of the necessary papers, and the former course of the association in permitting Brown to make the loans, misled the defendant into paying his note to him.

In this case one of the two innocent parties must suffer, and if the jury should find from the above facts that one was negligent, the loss must be sustained by the one whose conduct has made the fraud possible. *Lawson v. Carson*, 50 N. J. Eq. 370.

Where one through negligence gives another power to practice a fraud upon innocent parties, the court will not interfere in his protection at the expense of the one who has been deceived. "What circumstances shall be sufficient to establish negligence * * * must be determined as a question of fact." *Heyder v. Excelsior Building and Loan Association*, 12 N. J. Eq. 403.

90 N. J. L.

Darville v. Freeholders of Essex.

A jury might also find that by its course in conducting its business the association had impliedly authorized Brown as its secretary, by whom all moneys paid to the association must be received according to the terms of its constitution, to surrender the note and collect the amount due.

Questions for a jury to determine being present, the direction for plaintiff was error.

The judgment under review will be reversed and a new trial awarded.

For affirmance—THE CHANCELLOR, BLACK, WILLIAMS, TAYLOR, GARDNER, JJ. 5.

For reversal—GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, JJ. 9.

JAMES DARVILLE, RESPONDENT, v. THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

The plaintiff having fallen from a county bridge, by reason of the giving way of an iron rail, and there being testimony from which the jury might infer negligence of the defendant, in the performance of its statutory duty of maintenance and repair, as well as the question of the defendant's ownership of the rail, and of the *locus in quo*; and also testimony from which an inference might reasonably be drawn, that the defendant assumed responsibility and exercised control over the rail in question—*Held*, that a motion to nonsuit, as well as a motion to direct a verdict were properly refused.

On appeal from the Essex Circuit.

For the respondent, *Hugh B. Reed*.

For the appellant, *Harold A. Miller*.

Darville v. Freeholders of Essex.90 N. J. L.

The opinion of the court was delivered by

MINTURN, J. The plaintiff was injured by falling from the entrance to a public bridge, crossing Third river, at Nutley, in the county of Essex. The cause of his fall he attributes to the negligence of the defendant in failing to use reasonable care to keep the rail or guard of the approach to the bridge in a reasonably safe condition.

The plaintiff fell while attempting to lean upon an iron guard rail which ran from the bridge at right angles to an adjacent blacksmith shop, out of which the plaintiff came and proceeded to cross the bridge. While he was stopping to answer the salutation of a friend, he placed his hand and weight upon the rail, when it gave way and precipitated him ten feet to the bed of the stream, producing the injuries which present the basis of this suit.

The defendant denies responsibility, insisting that the rail in question was not placed there by the county, and that at the time of the injury the plaintiff was not upon the public thoroughfare, but was upon private property adjoining the bridge, upon which was the rail, and that therefore the county was under no legal liability to maintain or repair it.

The alleged contributory negligence of the plaintiff, under the circumstances, presented the final ground of defence. These issues the trial court treated as jury questions, and refused a motion to nonsuit, and to direct a verdict based thereon.

There was testimony sufficient in the case from which a jury might infer that the county at the time the bridge was erected constructed the rail in question. There was testimony also from which a jury might conclude that the county recognizing its responsibility for the maintenance of the rail had at least six months prior to the accident caused the rail, with the rest of the structure to be painted, and that after the accident the county engineer ordered the rail repaired. The latter fact, while not directly evidential of liability, might be accepted as a recognition or admission by the defendant, of the extent of the defendant's ownership, or control of the rail.

These facts were met by counter evidence from which the jury might infer the absence of either ownership or maintenance, upon the part of the defendant, and some testimony from which it was argued that the *locus in quo*, upon which the plaintiff stood at the time of his fall, was private property, over which the defendant could not legally exercise any act of control or ownership.

These questions manifestly presented a jury question, involving, as they did, inquiries as to questions of fact, and not of law, and in leaving them to the jury the rule is common place that the trial court committed no legal error.

The production by the defendant of the plans for the construction of the bridge might have thrown light upon the question of the original construction, and have shown the presence or absence of the rail in question, but the failure to produce it left the question open, assuming the *locus in quo* to be private property, whether, during an interim of years since the original construction, the defendant may not have assumed the added responsibility, and imposed the corresponding liability upon itself by accepting permission, tantamount to a license from the adjoining landowner, to keep and maintain the rail as part of the structure, a legal status which the jury might reasonably infer in fact existed in view of the acts of supervision and maintenance, which the proof showed the defendant exercised over the entire structure.

The liability of defendant being entirely statutory (*Pamph. L. 1860, p. 285; Comp. Stat., p. 304, § 9*); *Maguth v. Freeholders of Passaic*, 72 N. J. L. 226; *Freeholders of Sussex v. Strader*, 18 Id. 108, the trial court properly left these questions to the jury, premising its comments upon the situation, with the fundamental considerations, that the defendant's liability was conditioned upon their answer to the inquiries whether the rail in question was part of the bridge, and whether the plaintiff at the time of the accident was upon defendant's property, or upon private property, over which the defendant assumed no responsibility and exercised no control.

Lightcap v. Lehigh Valley R. R. Co. of N. J. 90 N. J. L.

The charge of the trial court, and its rulings upon testimony, were in consonance with these principles of liability, and the judgment will therefore be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

AVA LIGHTCAP ET AL., APPELLANTS, v. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, RESPONDENT.

Argued March 26, 1917—Decided June 18, 1917.

The defendant owning a tract of land, upon which was located a freight shed, filled in the land so as to change its topography, and the direction of the flow of surface water therefrom. Snow having accumulated on the retaining wall of the embankment erected the water flowed therefrom over the adjacent sidewalk and froze thereon. The plaintiff while walking on the sidewalk slipped, fell and was injured. In an action to recover for the injuries, the trial court charged the jury that unless there was affirmative proof in the case, from which they could infer, that the ice upon the sidewalk was caused by melting snow, which had been transported from another locality, to the defendant's premises, there could be no recovery; and also that the mere presence of piles of snow upon defendant's wall presented no proof that the snow had been carried thereto from another place by the defendant or its agents—*Held*, that the instructions of the court in these particulars were correct.

On appeal from the Warren County Circuit Court.

For the appellants, *William C. Gebhardt*.

For the respondent, *Smith & Brady*.

90 N. J. L. Lightcap v. Lehigh Valley R. R. Co. of N. J.

The opinion of the court was delivered by

MINTURN, J. While walking along Mercer street, in the town of Phillipsburg, the appellant fell and injured her knee-cap. She attributed the accident to the dangerous condition of the walk, owing to the accumulation of ice thereon, caused, as she alleges, by the wrongful act of the defendant in causing to be brought an accumulation of snow upon its lands adjoining the walk, which snow in the process of melting flowed upon the sidewalk, thereby creating a public nuisance and causing the injury in question.

The facts elicited from the testimony show that the defendant was owner of a tract of land which was used by it for a freight station. That it filled in the tract to such an extent as to work a change in the topography of the land, and to cause the surface water to run in a southerly instead of, as formerly, in an easterly course.

The municipality caused a street to be opened along the easterly line of the defendant's property, thereby requiring the excavation of the earth along defendant's line, which in turn necessitated upon defendant's part the erection of a stone retaining wall along the line of the sidewalk. The snow which accumulated upon the property was precipitated over the wall in the form of water, and running upon the adjoining sidewalk became frozen, thereby producing the condition which caused the accident.

The liability of the defendant was predicated upon the theory of alleged fact, that it had caused quantities of snow to be carried upon or near its wall, which, having melted, produced the condition complained of.

It will be observed that the plaintiff sought to charge the defendant with liability upon the principle enunciated in the English Exchequer in the case of *Fletcher v. Rylands*, L. R. 1 Ex. 265; 3 H. L. 330, to the effect that one who for his own purposes brings on his lands and keeps and collects there anything likely to do mischief if it escape, must keep it at his peril, and if he fail so to do is *prima facie* answerable for all damage which is the natural consequence of his act. While

Lightcap v. Lehigh Valley R. R. Co. of N. J. 90 N. J. L.

this doctrine has not been repudiated as a legal principle, it has been placed in the category of *vexatio questio*, both in this country and in England, by the criticisms of the courts and the text writers, as a principle of law fundamentally unquestionable but containing a statement too generic in form for practical application as a test of legal liability, and consequently it has been definitely qualified, distinguished and limited by the adjudged cases until the original statement has become quite attenuated. *Nichols v. Marsland*, 2 Ex. D. 1; *L. R.* 10 Ex. 255; 1 Ex. R. C. 272; *Losee v. Buchanan*, 51 N. Y. 476; *Gorham v. Gross*, 125 Mass. 232; *Wilson v. New Bedford*, 108 Id. 261; *Cahill v. Eastman*, 18 Minn. 324; *Cooley Torts* 573; 14 Am. L. Rev. 1.

In this state Chief Justice Beasley in *Marshall v. Wellwood*, 38 N. J. L. 339, criticises it on the ground that it is a rule "mainly applicable to a class of cases which I think should be regarded as in a great degree exceptional."

In the case in which it was applied in the Exchequer, the trend of opinion is that its application to the situation was proper and justifiable, but the consensus of opinion in later cases supports the criticism of Chief Justice Beasley that the doctrine enunciated "is amplified and extended into a general, if not universal principle," and following the New York case of *Losee v. Buchanan*, *supra*, he held, speaking for our Supreme Court, in a case involving damages caused by the explosion of a boiler, that in principle the doctrine was inapplicable.

But if we assume that the doctrine might be applicable to the circumstances of the case at bar, from the plaintiff's conception of it, we are met by the controlling fact that in no aspect of the testimony can it be affirmed that the defendant brought upon its land the cause of the damage, so as to enable the plaintiff to invoke the rule referred to, and the doctrine therefore can have no application here.

The conclusion that the defendant transported the snow from another place to its premises because the snow was heaped upon the wall, at a period of the year when snow was

90 N. J. L. Lightcap v. Lehigh Valley R. R. Co. of N. J.

universal in the neighborhood, is manifestly a *non sequitur*, and rests entirely upon the obvious fallacy that because the snow was there, the defendant and not *vis major* or other extraneous cause brought it there, for which act under the many qualifying cases following *Fletcher v. Rylands, supra*, legal responsibility could not be imposed upon a landowner entirely quiescent and guilty of no active tort-feasance.

An interesting and well considered resume of the doctrine herein discussed, particularly with reference to the liability which emanates from the application of the maxim *sic utere tuo ut alienum non lædas*, and its many qualifications in practical use to a situation like the present, will be found in the May number of the Columbia Law Review, page 388. *Nichols v. Marsland*, 2 Ex. D. 1; *Penn Coal Co. v. Sanderson*, 113 Pa. St. 126; *Marshall v. Wellwood, supra*.

In this aspect of the case, however, assuming the rule to be applicable to the plaintiff, she manifestly is in no situation to complain, since the trial court allowed the case to go to the jury upon a charge which expressly left it to them to find as the test of liability whether or not the defendant had transported the snow to its premises, and they found to the contrary.

In contradistinction, however, to the doctrine of liability thus applied, the non-liability of the defendant for damages resulting from the mere presence of the snow upon its premises, in the absence of proof of active tort-feasance in bringing it there, has been settled beyond controversy by the pronouncements of the courts of this state.

This court in *Jessup v. Bamford Brothers Co.*, 66 N. J. L. 641, in an opinion by the present Chief Justice, approving the doctrine enunciated by the Massachusetts Supreme Court in *Gannon v. Hargadon*, 10 Allen 106, declared that "the right of an owner of land to occupy and improve it in such manner, and for such purposes, as he may see fit, either by changing the surface or by the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjacent owners,

Lightcap v. Lehigh Valley R. R. Co. of N. J. 90 N. J. L.

that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it from the surface of adjacent lots, either to stand in unusual quantities on other adjacent lots or to pass into or over the same in greater quantities, or in other directions than they were accustomed to flow." And the general doctrine was enunciated that "the obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." To the same effect are *Bowlsby v. Speer*, 31 N. J. L. 351; *Lightcap v. Lehigh Valley Railroad*, 87 Id. 64; *Sullivan v. Browning*, 67 N. J. Eq. 391.

The trial court consistently with this conception of the law instructed the jury that unless they could find from the testimony that the defendant carried the snow from another place to the premises in question, thereby causing the condition which superinduced the accident, there could be no recovery.

The jury having found for the defendant, the plaintiff argues that the trial court was in error because it declined to charge that the defendant by filling in the land changed the topography of the premises, and incidentally the adjoining lands, so as to cause a change in direction of the previously existing water-course, thereby causing the conditions complained of. As has been stated there was no proof that the defendant or its agent had transported the snow, or that they had in any manner transposed its condition or its original *situs* further than the fact that it existed in piles upon the wall, which incident, as we have intimated, was neither convincing nor evidential to show its transference from elsewhere to the premises in question, and, as we have observed, the mere fact that the defendant exercised over his land an indubitable right of ownership in changing the grade or slope to suit the defendant's convenience or necessities in the use thereof, presents no ground of liability for an incidental injury to another, but is clearly *damnum absque injuria*.

90 N. J. L. Lightcap v. Lehigh Valley R. R. Co. of N. J.

"Affirmative" evidence, the trial court declared, must be found in the case from which an inference could be rationally drawn that the snow on the wall was an accumulation transported to the premises from another locality, and to this direction exception is taken. When it is recalled that the gravamen of the action was the active interference by the defendant with the normal situation, by the transportation to its premises of an element in which inhered the possibilities of danger and damage, in the absence of the exercise of due care in its management and control, it is not perceived in what aspect of the situation the use of the adjective in question can be characterized as either inappropriate or misleading, or as conveying any definitive meaning, unless it be considered as conveying a correct indication of the *quantum* and quality of the proof necessary to entitle the plaintiff to recover under the testimony and the rules of law to which we have adverted.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

VOL. XC.

40

More v. Richards.90 N. J. L.

RICHARD M. MORE ET AL., RECEIVERS FOR B. S. AYARS
& SONS COMPANY, RESPONDENTS, v. CHARLES G.
RICHARDS, APPELLANT.

RICHARD M. MORE ET AL., RECEIVERS FOR B. S. AYARS
& SONS COMPANY, RESPONDENTS, v. SIMON MILNER,
APPELLANT.

RICHARD M. MORE ET AL., RECEIVERS FOR B. S. AYARS
& SONS COMPANY, RESPONDENTS, v. CHARLES SIL-
VER, APPELLANT.

Argued March 16, 1917—Decided June 18, 1917.

The defendants agreed in writing, to produce from their respective farms, tomatoes, of a given quality, by a certain time, and deliver same to the vendee, and before the period of delivery mentioned in the contract the vendee was declared insolvent, and receivers were appointed therefor. In a suit by the receivers to collect a claim against the defendants for fertilizer, which claims were certain in amounts and admittedly correct, the defendants set up by way of set-off their unliquidated demands against the insolvent company, for failure to receive the tomatoes. *Held*, (1) that being unliquidated the demands were not capable of set-off under the Corporation act, which accords the right of set-off only to claims arising out of mutual dealings; (2) the defendants had not perfected their right to sue because of failure to deliver or a tender of delivery; (3) the recognition of unliquidated claims not entitled to any legal preference against the receivers, would accord to such claims a preference in the distribution of the assets of the insolvent company, contrary to the provisions and spirit of the Insolvent act.

On appeal from the Cumberland County Circuit Court.

For the respondents, *James S. Ware, William A. Logue*
and *Walter H. Bacon*.

For the appellants, *Alvord & Tusso*.

90 N. J. L.More v. Richards.

The opinion of the court was delivered by

MINTURN, J. The respective defendants in these three suits are sued by the receivers of the B. S. Ayars & Sons Company, upon contracts, similar in form and substance, entered into between that company during its active existence with each of the defendants. The company sold the defendants quantities of fertilizer for their respective farms, and in turn entered into the agreements in question, whereby the defendants, respectively, contracted "to plant and thoroughly cultivate" and to deliver to the company specified acreages of tomatoes, of a specified quality, during the season of 1913, and to receive from the company therefor \$8.25 per net ton.

The fertilizers were delivered, but the tomatoes were not, because the company, before their fruition, had become insolvent, and had gone into the hands of the present plaintiffs as receivers. The receivers brought suits to recover for the agreed price of the fertilizers, regarding which no question was made. The defendants interposed pleas of set-off, whereby they alleged that they were damnified by the failure of the company to execute its contract, by accepting delivery of the tomatoes, to an amount greater than the agreed price of the fertilizers, which damage they claim should present a legal set-off to the plaintiffs' claim.

No question is made that the tomatoes were raised, and that in every essential, but the fact of delivery, the defendants complied with their contract. Upon this assumption a jury was dispensed with at the Circuit, and by consent of counsel the legal questions arising upon the facts were submitted to the court.

It was conceded that the tomatoes matured from day to day after August 1st, 1913, and that the receivers were appointed July 21st, 1913, and that on July 28th, 1913, a restraining order was made by the Court of Chancery enjoining the company from transacting business except through its receivers.

It was also in evidence that the receivers did not operate the company's canning factory. Upon these facts the court

More v. Richards.

90 N. J. L.

found for the plaintiffs, from which determination these appeals are taken.

It is argued that the Ayars company, in its sale of fertilizers, was the agent of another company, known as the Tygest Company. The trial court, however, found it unnecessary to interpolate this fact into the issue, but disposed of the questions upon the concrete inquiry, whether under the facts stated an action will lie against the receivers.

It is apparent that when the receivers were appointed these contracts had not matured, and therefore no delivery had been made, and that no tender of the tomatoes was thereafter made. The case, therefore, is within the narrow compass of an unliquidated demand, which the defendants seek to offset against a distinct independent and liquidated demand, which the plaintiffs, as receivers, are called upon *virtute officii* to collect for the purpose of administering the affairs of an insolvent corporation, whose liability for the claim in question at the time of adjudicated insolvency was not fixed.

The manifest effect of a judgment against the receivers, under the circumstances, is to single out these defendants among the creditors, and concede to them a preference upon claims in nowise distinguishable from the great body of unpreferred claims, and accord them a preferential status, conspicuously opposed to the letter and spirit of the law which liquidates such claims upon a basis of equality, in the distribution of assets. *Comp. Stat.*, p. 1652, § 86; *Lehigh, &c., Co. v. Stevens Co.*, 63 N. J. Eq. 107; *Doane v. Millville Insurance Co.*, 45 *Id.* 274.

It is equally obvious, upon well-settled principles, that in order to acquire a legal status for the purpose of maintaining their suit against the receivers, and of putting them in the category of vendees, or the legal representatives of vendees, who have repudiated their contracts, the defendants should have tendered performance or delivery of the subject-matter of the contracts, after the period provided in the contracts had arrived. *Florence Mining Co. v. Brown*, 124 U. S. 385; *People v. Globe Mutual Insurance Co.*, 91 N. Y. 174.

90 N. J. L.More v. Richards.

It is to be observed that the Corporation act, section 66, provides that in cases of mutual dealings between the corporation and its creditor, just set-offs may be allowed "according to law and equity."

The situation here disclosed presents no appearance of mutual dealings, upon which the receivers might have exercised their judgment, in dealing with the claims, upon the basis of mutual set-offs, as contemplated by the statute; and in this connection it is also to be observed that the claims in question were not presented to the receivers upon oath, for administration as required by section 76 of the Chancery act, which requires every claim against an insolvent corporation to be presented to the receiver, in writing, under oath.

Quite obviously, therefore, the effort is to obtain by judgments against the receivers a legal status which will accord to the defendants a preference in the distribution of corporate assets, superior to the status accorded by law to the ordinary claimant.

The case is not like *Rosenbaum v. Credit System Co.*, 61 N. J. L. 543; 40 Atl. Rep. 591, where no injunctive order restrained the defendant from transacting business, and permitted the plaintiff to continue his services under the receivership, thereby conceding to him a legal status which is not presented by the record before us.

The result of these considerations is that the judgment of the trial court must be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—BLACK, WHITE, HEPPENHEIMER, JJ. 3.

Title Guar. & Surety Co. v. Fusco Const. Co. 90 N. J. L.

THE TITLE GUARANTY AND SURETY COMPANY, RESPONDENT, v. FUSCO CONSTRUCTION COMPANY AND DONATO FUSCO, APPELLANTS.

Submitted March 26, 1917—Decided June 18, 1917.

The plaintiff in consideration of the execution of an agreement of indemnity to it by defendants, executed a surety bond to the town of Harrison, New York, for the due performance of the contracts of the defendant company, with the town. The indemnity agreement provided for the payment of annual premiums during the continuance of the work, and the payment of incidental expenses in case of suit. The only affirmative defence pleaded, was that the contracts were completed before the maturing of the annual premium sued for. The proof showed otherwise, and no contradiction of the substantial allegations of the plaintiff's loss being apparent, the trial court directed a verdict for the plaintiff. *Held*, upon review of the testimony, that the action of the trial court was not erroneous.

On appeal from the Supreme Court.

For the respondent, *Cohn & Cohn*.

For the appellants, *Charles M. Mason*.

The opinion of the court was delivered by

MINTURN, J. The plaintiff, a foreign corporation, brought suit against defendants, the defendant company being a corporation of this state, to recover premiums due on three bonds given by the plaintiff, as surety for the Fusco Construction Company, to the town of Harrison, in the State of New York, to ensure the completion of certain contracts entered into by the construction company with the town, for the construction of a sanitary sewer system therein.

The allegation of the complaint is that in consideration of the plaintiff's suretyship, the defendants agreed, in writing, with the plaintiff, to pay in cash the annual premium, upon each of said bonds, and to continue the payment of the same,

90 N. J. L. Title Guar. & Surety Co. v. Fusco Const. Co.

until the plaintiff should be discharged, according to law, from all liability upon the obligations.

The agreement also contained a provision of indemnity, in virtue of which the plaintiff was to be saved harmless from any loss or liability by reason of its execution of the obligations, including disbursements and costs and counsel fees incurred in collecting the premiums due upon the bonds.

The breach alleged was that the premiums remained unpaid for the years 1914 and 1915, maturing, respectively, on the 6th of December in each year. The answer of both defendants contained a general denial of the allegations of the complaint, and an averment that the contract in question was completed by the company prior to December 6th, 1913.

The trial at the Circuit resulted in a direction of a verdict for the plaintiff, and the appeal lies from that determination. The due execution of the bonds was not denied in the proof. It is contended that there was a variance between the allegation and the proof, in that two of the bonds were dated December 6th, and since the indemnity agreement was dated December 19th, the inference to be drawn was that the latter could not have been executed as *quid pro quo* for the former. No proof was tendered to support the contention, while the proof was ample and uncontradicted that the agreement of indemnity presented the moving motive for the execution of the bonds. It is also to be observed that the test is not fixed by the date of the bond, but by the date of delivery thereof.

The argument that the agreement was without consideration is based upon the same misconception, and falls with it; and it is to be noted that no averment of the kind is made in the answers, and that the agreement itself refers to the execution of the bonds as *quid pro quo* for the *execution of the agreement*.

The third bond was in fact dated December 28th, and the premiums for the first year were paid, and it was proved and stands apparently without dispute in the record that the performance of the contract consumed more than a year, so that the premiums again matured on December 6th, 1914,

Betts v. Massachusetts Bond. & Ins. Co. 90 N. J. L.

and the liability of the defendants for their payment, consequently, is manifest.

Certain ledger cards containing statements of payment of premiums by defendants were admitted in evidence over the defendants' objection, that they were not original entries, and were not properly proved.

If this contention be conceded, their admission was in nowise injurious to the defendants, since, without their presence in the case, the proof was ample from other sources upon which to base defendants' liability. The substantial allegations of the complaint remained unchallenged and uncontradicted in the proof; and we think the right, if not the duty of the court, under the circumstances, manifestly was to adopt the course it pursued, and to direct the judgment appealed from, which will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

EDWIN BETTS, RESPONDENT, v. MASSACHUSETTS BOND-
ING AND INSURANCE COMPANY, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

1. The terms of a policy of insurance, made between the insurance company and a dentist, to protect the dentist "against loss from the liability by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error, or mistake or malpractice occurring in the practice of the assured's profession as described in the application" and "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person in consequence of any

90 N. J. L. Betts v. Massachusetts Bond. & Ins. Co.

alleged error or mistake or malpractice, by any assistant of the assured while acting under the assured's instructions" contained, among others, the provision that the company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured. *Held*, that the insurance company was not liable, under the policy of insurance, to the assured, for damages recovered against him for the malpractice of an assistant, who was held out, by the assured, to the public and to the insurance company, as a licensed dentist, whereas, in fact, the assistant was, to the knowledge of the assured, not licensed to practice and was acting in direct violation of the laws of the state covering the practice and licensing of dentists.

2. *Held, also*, that under the terms of the policy, in order for the assured to recover, it must appear that the error, mistake or malpractice of the assistant occurred while acting under the assured's instruction.
3. Upon grounds of public policy, one who actively or passively participates in violating a statute, cannot recover damages for a loss occasioned by such violation; following and applying the doctrine enunciated in *Hetzel v. Wasson Piston Ring Co.*, 89 N. J. L. 205.

On appeal to the Supreme Court.

For the appellant, *Kalisch & Kalisch* (*Isidor Kalisch* on the brief).

For the respondent, *Joseph Steiner*.

The opinion of the court was delivered by

KALISCH, J. This case is a sequel to *Klitch v. Betts*, decided by us at the June term, 1916, and reported in 89 N. J. L. 348. There it appears that the respondent herein, a licensed dentist, was sued for malpractice by one Klitch for injuries inflicted upon his jaw by one Snively, an assistant to the respondent, while in the performance of a dental operation. It further appears that Dr. Betts, the defendant in that case and the respondent herein, endeavored to defend upon the ground that his assistant, Snively, had done an unauthorized and illegal act in operating on Klitch's jaw in the absence of and not under the supervision of the respondent, Snively not being licensed to practice dentistry in this state.

We held that Dr. Betts had so arranged the conduct of his business office as to hold out Snively as his lawful assistant, and, therefore, was answerable for the assistant's negligence to Klitch, and upon that ground we sustained the judgment obtained against Betts.

Dr. Betts, having paid the judgment, brought an action against the appellant insurance company to recover the amount so paid, basing his action on a policy of insurance issued to him by the appellant company whereby the company had agreed to protect him, as a licensed dentist practicing in this state, against loss from liability to any person or persons upon certain terms and conditions to be later herein set forth and considered.

The case was tried at the Essex Circuit, and by stipulation the record and testimony in the case of *Klitch v. Betts, supra*, together with the record of this court in that case, were put in evidence, with some slight additional testimony.

Upon these records and testimony Betts recovered a judgment against the insurance company, from which it has appealed.

The argument addressed to us, by counsel for appellant, for a reversal of the judgment, is that the respondent was not entitled to recover a judgment against the appellant because, by the uncontroverted testimony in the case, it appears that the negligent act of Snively, for which the respondent was held answerable in damages, was not covered by the contract of indemnity, in that Snively was not a licensed and registered dentist, and, therefore, under the law of this state was not only not authorized to perform a dental operation but was expressly forbidden to do so, the statute making it a misdemeanor, and that by the terms of the policy it was expressly agreed that the company should not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured or any assistant; that the malpractice or error in the dental operation performed by Snively was not done while acting under the assured's instruction, which is one of the requirements of the policy as a basis of the right of the

assured to indemnity; that the respondent knew that Snively was not licensed and registered to practice dentistry in this state, and, nevertheless, was employed and held out by respondent as his assistant in performing dental operations, which was in express violation of the Dentistry act, which statute makes such conduct a misdemeanor, and, therefore, the respondent does not come into court with clean hands and should not be permitted to make his unlawful act the basis of a right to recover; that in the application for the policy of insurance the respondent stated that he employed no physician, surgeon or dentist regularly on a salary or commission except Dr. Charles L. Snively, and thereby he falsely represented that Snively was a licensed and registered dentist of this state, and that being so, he subjected the insurer to a risk which was not contemplated by it and which was concealed from the insurer, and, therefore, the contract of insurance became void; and lastly, that no notice was given by respondent to the company of any claim made by Klitch upon him within the time required by the terms of the policy.

Turning to the policy of insurance we find that by its terms the insurance company agreed to protect the respondent (1) "against loss from the liability by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error, or mistake or malpractice occurring in the practice of the assured's profession as described in the application for this policy;" (2) "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error or mistake or malpractice, by any *assistant* of the assured while *acting* under the assured's instructions."

This undertaking of the insurer is made by the policy, subject to certain conditions contained therein, but for the purpose of this case, it will suffice to set forth conditions B and C. Condition "B" provides that the company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured. Condition "C" provides

Betts v. Massachusetts Bond. & Ins. Co.90 N. J. L.

that the assured shall give immediate written notice of any charge of error or mistake or malpractice, and of any claim for damages covered by this policy to the home office of the company or its authorized agent.

The respective rights of the litigants in this controversy must be determined by the contract of insurance.

The language of the contract is neither technical nor ambiguous, and, therefore, no difficulty can interpose itself to prevent applying the well-recognized canon of construction, by giving the language employed its legal, natural and ordinary meaning.

This court, in *Bennett v. Van Riper*, 47 N. J. Eq. 563 (on p. 566), speaking through Mr. Justice Scudder, said: "Where there is no fixed legal or technical meaning which the court must follow in the construction of a contract, then 'the best construction,' says Chief Justice Gibson, is that which is made by viewing the subject-matter of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention."

Therefore, upon the threshold of the present inquiry into what the legal obligations and rights, flowing from the agreement between insurer and insured, were, and are, we must first pay due regard to the fact that state legislation, for the protection of the public against charlatanism and imposition, has put the practice of dentistry under statutory control. Section 1 of the act relating to dentistry (*Comp. Stat.*, p. 1911) provides that only persons who are now duly licensed and registered, pursuant to law, and those who may hereafter be duly licensed and registered as dentists, pursuant to the provisions of this act, shall be deemed licensed to practice dentistry in this state.

The eighth section of the act provides, *inter alia*, that the act shall not be construed to prohibit an unlicensed person from performing mechanical work upon inert matter in a dental office or laboratory or to prohibit a registered student of a licensed dentist from assisting his preceptor in dental

operations while in his presence and under his direct and immediate personal supervision.

This section further provides that a person shall be regarded as practicing dentistry within the meaning of the act who shall use the words "doctor of dental surgery," "doctor of dental medicine," or the letters "D.D.S." or "D.M.D.," in connection with his name, or any other title intended to imply or designate him, &c., as a practitioner in all its branches.

Section 12 of the act provides that any person, company or association practicing or holding himself or itself out to the public as practicing dentistry, not being at the time of said practice or holding out legally licensed to practice such in this state, shall be guilty of a misdemeanor.

This being the established law regarding the practice of dentistry in this state at the time the parties to the contract entered into it, they will be held to have done so with full knowledge of the legal effect of their contractual act.

The appellant was entitled to rely on the safeguards which the law erected against improper and illegal practice of dentistry which tends to lead to error, mistake or malpractice.

The record in *Klitch v. Betts, supra*, establishes that the uncontroverted fact that Snively, both unlicensed and unregistered to practice dentistry, did, as an assistant to Dr. Betts, a licensed dentist, in the dental office, and, in the absence of Dr. Betts, perform several dental operations upon Klitch and treated the latter's injured jaw resulting from such operations. These acts were clearly in express violation of the statute which forbids dental operations by an unlicensed person. The record also clearly shows that Betts employed and permitted Snively to perform dental operations while he was an unlicensed person, which was a clear violation of the policy.

Snively's acts, being both unlawful and unauthorized, and not having occurred while acting under the assured's instruction, by force of the provision of the insurance contract which limits the liability of the insurance company to injuries or death in consequence of any alleged error or mistake or malpractice, by an assistant of the assured while acting under the

*Betts v. Massachusetts Bond. & Ins. Co.**90 N. J. L.*

assured's instruction, cannot, therefore, operate to create any liability on part of the insurance company to indemnify the respondent.

Besides this conclusive bar to the respondent's right to a recovery, condition "B" of the policy of insurance expressly provides that the insurance company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on part of the assured.

The insurer is entitled to the protection which this clause affords it. It is of the very essence of the contract. It is difficult to perceive in what reasonable way the insurance company could have protected itself against claims arising out of illegal act or acts by unauthorized persons than the one agreed upon between the parties to the contract, by limiting the liability of the company to claims arising out of mistakes, error or malpractice against a dentist or his assistant in the lawful practice of dentistry.

The fact that the assistant was a dentist of another state does not make it the less a substantial violation of the law of this state and his act an unauthorized one. In the legal aspect his act stands upon the same level as if it had been performed by a butcher or a blacksmith, or any other unqualified person.

It is suggested that condition "B" has only reference to where the violation of the law is the proximate cause of the injury. We must bear in mind that we are dealing with liability arising out of contractual relations and not with liability arising out of a tort.

There is no legal obstacle in the way to parties agreeing, as in this case, what shall or shall not be the basis of liability. If they fix remote causes as a basis, it is not for us to say that they intended to fix proximate. In the present case, however, it might be properly said that the violation of law, in that the unauthorized act of an unlicensed dentist in this state caused the malpractice, was in a certain sense the proximate cause.

The record in *Klitch v. Betts, supra*, establishes that injuries from which Klitch suffered were inflicted upon him by Snively, the respondent's assistant, in a dental operation. Before a person can lawfully practice dentistry in this state, he must submit himself to both a written and oral examination by the state board of registration and examination in dentistry, and if the board finds the applicant qualified to practice dentistry and of good moral character, he will be entitled to a license and be registered. Snively had never submitted himself to any such test as to his qualifications in order to obtain a license, and, therefore, in the eye of the law, his status was that of a person not qualified to practice dentistry. It was the direct result of Snively's unlawful act, coupled with his want of ordinary skill that caused the injury. It would not be reasonable to hold the insurer liable for the malpractice of an assistant whose act was, to the knowledge of Betts, contrary to law.

We think also that the respondent is debarred from recovering on the policy, because it appears that the basis of his claim of recovery is the unlawful act of Snively in which the respondent participated, by holding Snively out as a licensed dentist to the public and to the appellants.

It is to be observed that in the contract of insurance the respondent makes and warrants the truth of the statements made by him in applying for the insurance. He made this statement: "I employ no physician, surgeon or dentist regularly or on a salary or commission except as follows: Dr. Charles L. Snively." It has already been pointed out that a person shall be regarded as practicing dentistry within the meaning of the Dentistry act who shall use a title, &c. Therefore, when the respondent made the statement and gave the title "Dr." to Snively, knowing that Snively was not entitled thereto, under the law of this state, he made an untruthful statement.

It is manifest that the truthfulness of this statement was highly important to the insurer. For it determined one of the risks that the insurer was to insure against. It was one of the risks to be covered by the policy of insurance and, there-

fore, it was essential that the statement in relation thereto should be true.

We need not spend time to demonstrate that the risk of mistake, error, &c., is greater in the case of one who is not legally qualified to practice dentistry than in the case of one who is.

The legislature has declared what the qualification to practice dentistry shall be, and, in the absence of a license to practice dentistry, there will be an absence of presumption of qualification. It is, therefore, apparent that the object of requiring a statement as to the status of the person or persons is to apprise the insurance company of the risk which it was insuring against.

Upon the question whether the insured will be permitted to recover on his contract where he has sustained a loss, which loss arose through the act of an assistant in violating the law, related to the subject-matter of the contract, the lawful practice of dentistry, and in which violation the insured either actively or passively participated, we are unable to distinguish, on grounds of public policy, the present case from the case of *Hetzel v. Wasson Piston Ring Co.*, recently decided by this court, and reported in 89 N. J. L. 205.

In that case it was held that the father disentitled himself of his right of action to recover for loss of the services of his son, who was injured while in the employ of the company, because it appeared that the son was under fourteen years of age, and hence was employed in violation of a statute which imposed a penalty of \$50 on any corporation, firm, individual, parent or custodian who permitted such employment. Chief Justice Gummere, speaking for this court (on p. 308), says: "The injury to the plaintiff's son is the direct result of the joint violation of the act of 1904, by the defendant and the plaintiff, and the stripping of the child of that protection which the legislature by that statute declared he should have.

"The plaintiff can take nothing by way of compensation for a loss which has come to him as the direct result of his own violation of law."

90 N. J. L.

Breidt Brewery Co. v. Weber.

In the present case, the insurance company is a wholly innocent party, which was not the fact as to the company in the case just referred to, and, therefore, there is a stronger reason for denying the respondent's right to a recovery.

Furthermore, it is to be observed that the statement made by the respondent in his application for insurance, that Dr. Snively was his assistant, was a material statement, since it related to the risk which the company was taking, and, besides, the respondent warranted the statement to be true when he knew that Snively was not authorized to practice dentistry in this state. This of itself is sufficient to avoid the appellant's liability on the policy.

Having reached the result that the trial judge erred in not directing a verdict for the appellant, we find it unnecessary to consider the other matters assigned as grounds of appeal.

The judgment will be reversed.

For affirmance—SWAYZE, PARKER, BLACK, WHITE, HEP-
PENHEIMER, WILLIAMS, JJ. 6.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GAR-
RISON, TRENCHARD, BERGEN, MINTURN, KALISCH, TAYLOR,
GARDNER, JJ. 9.

THE PETER BREIDT CITY BREWERY COMPANY, RE-
SPONDENT, v. FRED WEBER, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

Where a brewing company agreed in writing to let a saloon prop-
erty "at a monthly rent of \$100, payable in advance," and the
tenant agreed "to pay a monthly rental for the premises of \$100
per month, payable in advance," the tenancy thereby created
was a monthly tenancy, notwithstanding that the tenant made
application annually, and paid an annual license fee for the
sale of intoxicating liquors, to the proper authorities, for several
years, the fact that the tenant made such yearly application
for such license not having the legal effect of changing the terms
of the letting.

Breidt Brewery Co. v. Weber.90 N. J. L.

On appeal from the Supreme Court.

For the appellant, *William R. Wilson.*

For the respondent, *John J. Stamler.*

The opinion of the court was delivered by

KALISCH, J. The fundamental question presented here is whether the trial judge was warranted, under the facts and circumstances of this case, in deciding, as a matter of law, that an agreement of letting between the parties was one from year to year and required a three months' notice to terminate.

The agreement between the parties, which is in writing, was entered into by them on the 10th day of June, 1910. By that instrument it appears that the brewing company agreed to let the premises therein mentioned to the appellant "at a monthly rent of \$100, payable in advance," and that the appellant agreed "to pay a monthly rental for the premises of one hundred dollars (\$100) per month, payable in advance." The premises were let to the appellant for the saloon business. The brewing company, by the terms of this agreement, obligated itself to put in a new front and to make such repairs and innovations on the interior as would make the premises suitable for the saloon business. The appellant obligated himself to apply for a license, or transfer of the existing license, to the excise board to conduct the business of retail liquor dealer on the premises. On the trial of the cause, it appeared that on the 26th day of July, 1910, the appellant procured the license from the board of excise, and that he renewed the same annually, the last renewal being from July 26th, 1915, to July 25th, 1916.

It further appeared that the appellant paid an annual license fee of \$500, and that the brewing company spent a considerable sum of money in putting the premises in condition for the conduct of the saloon business. On the 1st day of November, 1915, the appellant vacated the premises, having prior thereto given thirty days' notice to his landlord of his intention to vacate on the day mentioned as is required by law to be given to terminate a tenancy from month to month.

90 N. J. L.

Breidt Brewery Co. v. Weber.

The error complained of by appellant is presented by exceptions taken to that part of the court's charge in which he defines the nature and extent of the term agreed on by the parties.

The court appears to have assumed that because appellant paid a saloon license fee of \$500, year after year, from June, 1910, to July, 1915, that this had the legal effect of fixing the term of the lease from year to year. And it was in this view he charged the jury that the tenancy was not a monthly one, and that the appellant could not relieve himself from the obligations of the lease by giving one month's notice to quit to his landlord.

But this view is clearly untenable. The written agreement entered into by the parties in the present case does not show an annual rental reserved, and this circumstance, according to *Steffens v. Earl*, 40 N. J. L. 128, is a distinctive feature of a yearly letting, but, on the contrary, the writing shows that only a monthly rental was reserved, and in these express terms: "And to pay a monthly rental for the store or first floor and the basement underneath same of one hundred (\$100) per month, payable in advance." Concerning such a situation, Judge Reed, in the case cited (on p. 137), said: "But where there is no such letting (yearly), and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or a weekly one, just as the payment is monthly or weekly."

The letting in the present case was manifestly a monthly one and was subject to be legally terminated by either party giving one month's notice. The fact that the tenant made a yearly application for a license to conduct his business did not have the legal effect to change the terms of the letting. The rights and obligations of the parties must be determined by the terms of the contract of letting. This was, apparently, not done.

The judgment will be reversed and a *venire de novo* awarded.

Gromer v. George.90 N. J. L.

For affirmance—WHITE, TAYLOR, JJ. 2.

For reversal—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 12.

JULIUS GROMER, ADMINISTRATOR, APPELLANT, v.
JOSEPH GEORGE AND ANTONIO GEORGE, RESPONDENTS.

Submitted March 26, 1917—Decided June 18, 1917.

In a suit against a father and son for damages sustained by reason of the negligent operation, by the son, of an automobile, the admission of alleged hearsay testimony that the ownership of the automobile was in the son, and not in the father, was harmless, where the jury found the son "not guilty" of negligence, since, if the father was the owner of the car and the son was on his father's business, as his agent or servant, at the time of the infliction of the injury, the father would not have incurred any legal responsibility therefor unless it also appeared that the injury was due to the son's negligence and to which the decedent did not in anywise proximately contribute.

On appeal from the Supreme Court.

For the appellant, *William Greenfield*.

For the respondents, *John A. Matthews* and *William J. Dowd*.

The opinion of the court was delivered by

KALISCH, J. The appellant, who was the plaintiff below, appeals from a judgment entered on a verdict rendered by a jury in favor of the respondents, defendants below.

The appellant brought his action, as administrator of the estate of his son, a lad fourteen years of age, in the court be-

low, against the respondents, father and son, to recover damages for negligently causing the death of appellant's son.

The complaint charged the respondents with being "the owners, proprietors or lessees of a certain automobile," &c., and that on the 30th day of May, the respondents, their agents, servants, &c., did operate and run the automobile along the public highway, at a high rate of speed and in a careless, reckless and negligent manner, run into and against the appellant's decedent, who was then and there lawfully on the public highway, &c.

It is to be observed that the gravamen of the charge is negligence. This charge was negatived by the jury finding a verdict in favor of both respondents. On the trial the appellant sought a recovery against both respondents upon the theory that the father was the owner of the automobile, and that the son, while on the business of his father, negligently operated the car with the result as above stated.

The principal ground relied on by the appellant for a reversal of the judgment is that the trial judge illegally admitted hearsay testimony concerning the ownership of the automobile, in Antonio George, the son.

Even upon the assumption that such testimony was improperly admitted, it is obvious from the verdict of the jury, finding the son not guilty of negligence, that the admission of such testimony was harmless. For it is plain that if the father was the owner of the car, and the son was on his father's business, as his agent or servant, at the time of the infliction of the injury upon appellant's decedent, the father would not have incurred any legal liability therefor, unless it also appeared that the injury to the appellant's decedent was due to the son's negligence and to which the decedent did not in anywise proximately contribute.

The remaining exceptions discussed in the brief of counsel for appellant relate to what the trial judge said in his charge to the jury was necessary to be established by the evidence in order to make the father answerable in law for the negligent acts of his son in operating the machine. But in view of the

Duff v. Prudential Insurance Co.

90 N. J. L.

fact that the jury, by their verdict, exonerated the son from the charge of negligence, and without which negligence no legal liability could have been incurred by the father, it is manifest that if any error in stating the legal rule governing the father's liability was committed, it was harmless.

The judgment will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

RICHARD H. DUFF, ADMINISTRATOR, ETC., JOHN SULLIVAN, DECEASED, RESPONDENT, v. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

1. A finding of fact by the District Court, supported by evidence, that, in the application for a policy of life insurance, a statement, that the insured was not suffering from consumption was a willful untruth, vitiates the policy. This in effect is a finding that the policy was procured by fraud.
2. By statute *Pamph. L. 1907, p. 133, § 1 (4)* statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties.
3. The Supreme Court cannot review the findings of fact of the District Courts, when supported by evidence.

On appeal from the Supreme Court.

For the appellant, *Randolph Perkins*.

For the respondent, *Hershenstein & Finnerty*.

The opinion of the court was delivered by

BLACK, J. This was a suit brought on an industrial life insurance policy, issued to the decedent, John Sullivan, by the defendant company, for the sum of two hundred and forty-four dollars (\$244), on September 21st, 1914. The insured died of tuberculosis at the City Hospital in Jersey City, June 13th, 1915. The case was tried in the First District Court of Jersey City, by Judge Carrick, without a jury, resulting in a judgment rendered in favor of the defendant. The trial court found, as a fact, the statement made by the insured, in his application, that he had never suffered from consumption, in view of the previous history of the case, to have been a *willful untruth*, which vitiates the policy and prevents recovery thereunder. The evidence in the record amply supports this finding of fact by the trial court. The case was reviewed in the Supreme Court, which reversed the judgment of the District Court, on the ground that the false statement in the application, if it was false, did not vitiate the policy, in the absence of proof, that the company was induced to write the policy through fraud. The Supreme Court also said the case is substantially, though not precisely, similar to *Melick v. Metropolitan Life Insurance Co.*, 84 N. J. L. 437; *affirmed*, 85 *Id.* 727, in which the determining factor was the continued acceptance of weekly premiums by the company.

We do not agree with the conclusion reached by the Supreme Court. We think the judgment of the Supreme Court should be reversed and the judgment of the District Court affirmed.

In the application for the policy of insurance, which was dated September 9th, 1914, the insured stated that he had never suffered from consumption, that he was in good condition of health and had no serious disease. The company defended on the ground of the falsity of these statements.

The policy itself does not refer to the application for insurance. The statements in the application are not made warranties or conditions. The statute provides: "All statements purporting to be made by the insured shall, in the ab-

Duff v. Prudential Insurance Co.

90 N. J. L.

sence of fraud, be deemed representations and not warranties. Any waiver of this provision shall be void." *Pamph. L. 1907, p. 133, § 1 (4).*

The finding of facts by the District Court was not the subject of review by the Supreme Court. *Dordoni v. Hughes*, 83 N. J. L. 355. It seems to us, the necessary result of finding, that an application for a policy of life insurance contains a *willful untruth* as to whether the applicant had consumption was necessarily a finding that the policy was procured by fraud.

The Supreme Court thought there was no proof, that this misrepresentation was material, or that the company may have been aware of its falsity and issued the policy regardless of that fact. The fact that the company asks the question shows it is material, and it is common knowledge to assume that life insurance companies do not accept for life insurance tubercular persons.

It is said the most essential element of fraud is deceit. What could be the purpose of the insured making a statement, that was a *willful untruth* about his health, which he must have known was important and material, if it was not to deceive? Many definitions and illustrations of fraud, taken from adjudged cases, will be found collected in 3 *Words and Phrases* 2943. We agree with the District Court that a statement which is a willful untruth, as found by the District Court, in procuring the insurance policy renders it void, on the ground of fraud. This view results in a reversal of the judgment of the Supreme Court and an affirmance of the judgment of the District Court. It also renders unnecessary any further discussion of the points argued in the briefs of counsel.

The judgment of the Supreme Court is therefore reversed, with costs, and the judgment of the District Court affirmed.

For affirmance—None.

For reversal—THE CHANCELLOR, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

90 N. J. L. Jersey City v. Hud. & Manhattan R. R. Co.

THE MAYOR AND ALDERMEN OF JERSEY CITY, RESPONDENT, v. THE HUDSON AND MANHATTAN RAILROAD COMPANY, APPELLANT.

Argued March 20, 1917—Decided June 18, 1917.

1. The word "each" in an ordinance of Jersey City, providing for compensation to be paid the city, for the use of land privileges by a railroad company, in connection with its three routes, depending upon the amount of fare for each single passenger service, means any route and not all three routes.
2. Where an ordinance by its terms does not constitute a contract with a railroad company, for the use of land privileges, but does provide an option, the railroad company cannot retain the use of the privileges and refuse to pay the stipulated compensation.
3. A continued exercise of the privileges by a railroad company, under an ordinance accepted by it, evinces an election to pay the stipulated compensation and thereby creates a legal obligation to pay. The language of the ordinance construed will be found in the opinion.

On appeal from the Hudson County Circuit Court.

For the respondent, *James J. Murphy* and *John Bentley*.

For the appellant, *Collins & Corbin*.

The opinion of the court was delivered by

BLACK, J. The suit in this case was brought by the mayor and aldermen of Jersey City against the Hudson and Manhattan Railroad Company, to recover compensation for the conditional rights or occupancy, by the defendant company, of certain land privileges, in the public street, at Henderson and Grove streets, Jersey City, used by the defendant company for station purposes. The case was tried under a stipulated state of facts, on the second count of the complaint only, before Judge Speer at the Hudson Circuit, without a jury, resulting in a judgment, in favor of the plaintiff, for the sum of six thousand five hundred and twenty-five dollars (\$6,525).

Jersey City v. Hud. & Manhattan R. R. Co. 90 N. J. L.

The suit grows out of the construction of sections three (3), four (4) and six (6) of an ordinance of Jersey City, which was accepted by the defendant company on September 29th, 1910.

Those sections read thus:

"Section 3. Said railroad company, its successors or assigns, shall pay to the city, annually, except in the contingency hereinafter noted in section 4 hereof, for the right to use and occupy said tract of land aforescribed in section 1 hereof, and so long as it shall so use and occupy the same, in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City, or by any other authority, the sum of one hundred (\$100) dollars for the first year of occupancy dating from the acceptance of this ordinance and thereafter like payments for the entire period of the life of this ordinance. The permission to use and occupy said tract of land aforescribed to continue and remain in force so long as the rate of fare charged by said Hudson and Manhattan Railroad Company, its successors or assigns, between the Grove and Henderson street stations and Thirty-third street and Broadway, New York, and intermediate stations, and between the said Grove and Henderson street stations and the Hudson terminal, in New York, and intermediate stations, and between said Henderson and Grove street stations and Hoboken, New Jersey, and intermediate stations, shall not exceed for each single passenger service, one way, and in either direction, the sum of five cents."

"Section 4. If, at any time, after the passage and acceptance of this ordinance the said Hudson and Manhattan Railroad Company, its successors or assigns, shall proceed to charge and exact a fare exceeding five cents for each single passenger service as described in section 3 hereof, then and thereupon said railroad company shall immediately surrender to the city all privileges herein and hereby granted or then the annual payment to be made by said railroad company, its successors or assigns, for the use and occupancy of the tract of land aforescribed, shall in lieu of the amount of annual

90 N. J. L. Jersey City v. Hud. & Manhattan R. R. Co.

payment indicated in section 3 of this ordinance and in substitution therefor, be five thousand (\$5,000) dollars to be computed from the date of exaction by said company of such excess fare—such payment of five thousand (\$5,000) dollars to be in addition to such taxes or assessments which may be legally levied upon its personal and real estate by the city of Jersey City or by any other authority and to so continue for each and every year during the continuance of such increased rate. The said railroad company shall have the right of election hereunder.

“If by reason of the enforcement of the provisions of this section there shall have accumulated a deficiency in the annual payment herein in this section contingently required to be made, such accumulation shall in its entirety be paid by said company on the first payment day thereafter ensuing and as hereinafter provided.”

“Section 6. Proper proportions of the payments of the city herein provided for shall be made in advance to the city comptroller at his office in the city hall, on the first days of October and April next succeeding the acceptance of this ordinance, failing which payment for thirty days or a failure by said company to comply with all or any of the terms, requirements or obligations of this ordinance as heretofore expressed shall constitute an annulment of any and all permissions herein or hereby accorded, and the city may thereupon remove any and all obstructions herein authorized and restore any affected street or portion thereof at the entire cost and expense of said company without prior notice and without recourse to it.”

Some of the additional facts pertinent to this discussion are: The defendant railroad company, from the time it began operations, charged only five cents for each passenger service, from the Grove and Henderson street station eastward thereof, on any of its lines, until December 24th, 1911, when it raised its rate of fare to seven cents, between the Grove and Henderson street station and the stations in New York City on the Thirty-third street line. It did not increase the rate to the Erie station, to Hoboken, to Exchange Place, in Jer-

Jersey City v. Hud. & Manhattan R. R. Co. 90 N. J. L.

sey City, or to the Hudson terminal, in New York, the rate to those stations from Grove and Henderson street station and from Summit avenue station, remaining five cents—that is, passengers who go to New York from the Grove and Henderson street station, by way of the uptown line, are charged two cents extra fare to New York stations, and to those only.

There are five grounds of appeal—*first*, no breach of the alleged contract; *second*, no election under the fourth section of the ordinance; *third*, acceptance of \$100 per year by Jersey City after the increase of fare was a construction, by the parties to the contract that it had not been broken, by such increase.

The other two grounds of appeal—the fourth and fifth—are purely formal.

The argument is, the use of the conjunction “and” in section 3 of the ordinance, where reference is made to the three lines of the railroad and intermediate stations in connection with section 4, makes section 3 mean that the permission stands until the rate of fare is increased above five cents on all three lines; that for each single passenger service, one way or in either direction, means for all the lines, but we think the natural and intended meaning of the word “each” in this connection means “any,” *i. e.*, any one of the three lines.

It is next argued, the ordinance does not constitute a contract to pay; at best, it provides, merely, for an annulment. It may be conceded that section 4, in itself, does not constitute a contract to pay, but it gives the railroad company the option either to surrender its privileges to the city or to pay the five thousand dollars (\$5,000). When the railroad company continues exercising the privileges, it evinces an election to pay the increased amount, and it thereby becomes in law liable to pay. Section 6 does not militate against this conclusion. That section provides, simply, that the failure to make the payment of five thousand (\$5,000) dollars shall constitute an annulment of the permission granted. The city may thereupon enter and remove obstructions.

This is nothing more than the ordinary clause of forfeiture in a lease. It hardly seems reasonable, and it cannot be rea-

90 N. J. L.Rogers v. Warrington.

sonable, that one can have the option to make a contract valid or invalid, as he chooses; that he can retain the privileges and get rid of the obligation by refusing or failing to perform his part by paying the stipulated amount for the privileges so retained.

The other points need no discussion, they are without legal merit.

The judgment of the Circuit Court is therefore affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

For reversal—None.

JERUSHA B. ROGERS, RESPONDENT, v. SUSAN N. WARRINGTON, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

1. In New Jersey, the fee in the lands over which highways have been laid, is in the abutting owner.
2. The owner of the fee, for the soil in the highway, may maintain an action of ejectment against any person wrongfully taking or claiming exclusive possession of the same.
3. By the statute (*Comp. Stat.*, p. 2056, ¶ 13), in an action of ejectment for land occupied by the defendant, a plea of not guilty admits such possession as excludes the plaintiff.

On appeal from the Supreme Court.

For the appellant, *Kaighn & Wolverton*.

For the respondent, *George M. Hillman*.

Rogers v. Warrington.

90 N. J. L.

The opinion of the court was delivered by

BLACK, J. This was an action of ejectment. The record shows, however, that the plaintiff was the owner of a lot of land upon which her dwelling-house was erected, situate on the south side of Main street, at the forks of the road known as Perkins Corner, in Moorestown, Chester township, Burlington county, New Jersey. The suit was brought to recover possession of the land, in the public highway, in front of the plaintiff's lot.

The defendant erected a public drinking fountain, or watering trough, in the highway, the fee of which was owned by the plaintiff. The suit was brought to recover that portion of the highway, thus appropriated by the defendant, by the erection of the drinking fountain, or watering trough. The answer defends the action, as to a part of the premises claimed in the complaint, viz., the portion thereof; within the lines of the Main street, occupied by the public drinking fountain, erected by consent of the municipal authorities, as to which part the defendant denies the truth of the matters contained in the complaint. By force of the statute (*Comp. Stat.*, p. 2056, ¶ 13), the plea for the purpose of this action is an admission that the defendant was in possession of the premises, for which she defends. *French v. Robb*, 67 N. J. L. 260; *Jacobson v. Hayday*, 83 *Id.* 537.

The case was tried by the court at the Circuit, without a jury, resulting in a judgment for the plaintiff; the damages being assessed at six (.06) cents. The plaintiff's title to the fee of the premises in question being conceded, the plea admitting the defendant was in possession, the ruling of the trial court was not error in giving judgment for the plaintiff.

It is the accepted law of this state that lands on which streets and highways have been laid the fee is in the abutting owner. *Hoboken Land and Improvement Co. v. Mayor, &c.*, of *Hoboken*, 36 N. J. L. 540; *Starr v. Camden, &c., Railroad Co.*, 24 *Id.* 592.

It also has long been the settled law of this court that the owner of the soil in such cases may maintain an action of

90 N. J. L.

Peoples National Bank v. Cramer.

ejectment against any person wrongfully taking or claiming exclusive possession of the same.

All the cases are in harmony on this point: *Wright v. Carter*, 27 N. J. L. 76; *Hoboken Land and Improvement Co. v. Mayor, &c., of Hoboken*, *supra*; *French v. Robb*, *supra*; *Bork v. United New Jersey Railroad and Canal Co.*, 70 N. J. L. 268; *Moore v. Camden, &c., Railway Co.*, 73 Id. 599; *Johanson v. Atlantic City Railroad Co.*, Id. 767.

Whether the drinking fountain, or watering trough, is an additional servitude on the land to that of the highway, is not before us for consideration on this record. We, therefore, express no opinion on that point. Finding no error in the record, the judgment of the Supreme Court is therefore affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

THE PEOPLES NATIONAL BANK OF TARENTUM, PENNSYLVANIA, RESPONDENT, v. WILLIAM E. CRAMER, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

Where a promissory note was given in payment for a carload of glass bought and delivered, the fact that the contract for the glass also included four other carloads which the payee of the note failed to deliver, thereby entailing a loss on the maker of more than the amount of the note, is no defence to a suit on the note by a holder thereof for value in due course where there was no proof that such holder knew of such contract when it took the note. Under such circumstances it is immaterial that such holder did know that the payee "was losing money, was in a bad way, and in danger of going into the hands of a receiver."

Peoples National Bank v. Cramer.90 N. J. L.

On appeal from a judgment of the Supreme Court.

For the appellant, *Joseph Beck Tyler*.

For the respondent, *Grey & Archer*.

The opinion of the court was delivered by

WHITE, J. This is a suit upon a promissory note given by the defendant-appellant, Cramer, as drawer, to the Fidelity Glass Company, as payee, in payment for a carload of glass bottles purchased and delivered, which note was discounted prior to maturity with the plaintiff-respondent bank (the proceeds being duly placed to payee's credit) and upon maturity was not paid. The defence is, that the carload of glass bottles in question was part of five carloads contracted to be delivered by the payee to Cramer at a fixed price; that the payee went into the hands of a receiver and the remaining four carloads of the contract were never delivered, so that Cramer was compelled to buy elsewhere at a loss of more than the amount of the note; that the bank is chargeable with this defence because its cashier, Crawford, was given general authority by the directors to discount notes, and did in fact discount this note; that at the time he did so, which was two days before the receiver was applied for, he was also the treasurer and a member of the board of directors of the payee, Fidelity Glass Company, and as such knew that that company had been losing money, that it was going from bad to worse; that the manager told him that it could not fill its existing contracts by reason of the advance in cost of materials, &c., and that on the same day he was told this, which was the day he discounted the note, he advised the manager to call a meeting of the board of directors of the Fidelity Glass Company, at which meeting it was decided to apply for a receiver. Whether the payee was in fact insolvent is uncertain. Under the receivership it paid its creditors ninety-two cents on the dollar.

The learned trial judge directed a verdict for the plaintiff for the full amount of the note, with interest, on the ground

that the cashier, Crawford's, knowledge of these facts was not imputable to the bank because he acquired it not while acting for the bank, and because in the transaction in which he was acting for the bank, his interests as an officer of the payee, the Fidelity Glass Company, were opposed to those of the bank.

Upon this view we express no opinion because we do not find it necessary to do so, for the reason that assuming that all the knowledge which the cashier was proved to possess was properly imputable to the bank itself, the latter still became a holder for value in due course without notice of the defence here set up, because it is not shown that the cashier either as such or as treasurer and director of the Fidelity Glass Company knew of the outstanding contract with the drawer, Cramer, for the other four carloads. The evidence shows that the running of the business of the Fidelity Glass Company was in the hands of a manager, and, in fact, the cashier testifies that he had no such knowledge, and he is not contradicted. Without such knowledge it is obvious that it made no difference whatsoever to the bank's standing as a holder for value in due course, that it knew the payee-endorser of this note given for goods sold and delivered was losing money, was in a bad way, and in danger of having to go into the hands of a receiver. If it were otherwise, much of a bank's usefulness in enabling people in financial difficulties to avoid disaster would be destroyed.

The judgment is affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 14.

For reversal—None.

Brinsko v. Lehigh Valley Railroad Co.90 N. J. L.

THE ESTATE OF JOHN BRINSKO, RESPONDENT, v. LE-
HIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
APPELLANT.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court.

For the appellant, *Adrian Lyon*.

For the respondent, *Thomas Brown*.

PER CURIAM.

This suit was brought in the Middlesex Common Pleas under the Workmen's Compensation act (*Pamph. L. 1911, p. 134, amended Pamph. L. 1913, p. 302*), for compensation to the dependent widow and children of John Brinsko, deceased, who met his death by being run over by a car of the defendant company, of which company he was an employee.

After hearing and argument the trial judge found that deceased, while in the "course of his employment" with the defendant company, was run over by one of its cars and killed.

One of the defences interposed was, that at the time decedent met his death he was employed in moving cars engaged in interstate commerce, and that, therefore, the defendant is liable only under the Federal Employers' Liability act. On this head the trial judge found that for the purposes of the suit, it was not necessary to determine whether the car, which injured and caused the death of the deceased, was engaged in interstate commerce at the time.

With this finding the Supreme Court disagreed, but held that the award made by the trial judge in the Common Pleas was not vitiated on that account, because, on the finding of facts by the judge, the car was not engaged in interstate commerce, nor was the deceased. This was error.

In *Dunnewald v. Henry Steers, Inc.*, 89 N. J. L. 601, this court held that to warrant a recovery under our Workmen's Compensation act, it must appear that the employe's death was caused (1) by an accident (2) arising out, and (3) in the course, of his employment, and that all of these essential facts must be found by the trial judge and must be contained in his written determination.

As a matter of fact the trial judge, in the case at bar, while determining that the deceased's injury occurred in the course of his employment, failed to find that it arose out of that employment or was the result of an accident. And, owing to the defence of interstate commerce, he would have to go a step farther and find whether at the time of the accident the deceased was engaged in interstate or intrastate commerce. As shown above, he noticed the point, but held that it was unnecessary to determine it. If he had held that decedent was engaged in interstate commerce, then he could not have awarded compensation under our Workmen's Compensation act. See *Erie Railroad Co. v. Winfield*, 244 U. S. 170; *Rounsaville v. Central Railroad of New Jersey*, ante p. 176. On the contrary, if he had held that the deceased was engaged in intrastate commerce, then he could have awarded compensation, if he found, as facts, that the deceased came to his death as the result of an accident arising out of and in the course of his employment.

The right of the Supreme Court to review a proceeding under the Workmen's Compensation act is limited to questions of law, and it cannot review determinations of fact if there is evidence to support them. *Dunnewald v. Henry Steers, Inc.*, supra.

Upon the authority of the *Dunnewald* case the judgment of the Supreme Court affirming the judgment of the Common Pleas must be reversed, to the end that there may be a new trial and proper determination of the facts in the Common Pleas, either upon the evidence already put in, or such other evidence as the parties may see fit to offer. No costs will be allowed in this court.

Burnett v. Superior Realty Co.90 N. J. L.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

ELANOR BURNETT, BY NEXT FRIEND, AND FRANKLIN P. BURNETT, RESPONDENTS, v. SUPERIOR REALTY COMPANY, A CORPORATION, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which court the following memorandum was filed by Mr. Justice Parker:

“This appeal brings up a judgment recovered by the plaintiff, an infant of tender years, based upon the verdict of a jury for damages sustained by an accident. The grounds of appeal are for the most part indefinite and do not point out any legal error on the part of the trial court except the first, which sets up that the trial court refused to grant the motion for a nonsuit, and the second, that the court refused to grant a direction of a verdict in favor of the defendant. With the third, which is, that the verdict is contrary to the weight of evidence, we have nothing to do on this appeal; the fourth, that the charge was erroneous in law, specifies no error; the same may be said of the fifth, that the charge of the court on the measure of damages was based upon an erroneous rule of law; the sixth, that the damages were excessive, is not open to consideration at this time; the seventh, that there is no evidence of negligence on the part of the defendant, is covered by grounds one and two; and the eighth, and last, that the court admitted illegal evidence for the plaintiffs, is similar to the fourth in failing to specify what illegal evidence is complained

of and was objected to at the trial. The sole question therefore is whether there was a case for the jury.

"The plaintiff, a little girl of tender years, and too young to testify, was injured in the back yard of the apartment-house or tenement-house where she lived with her parents on the ground floor, by a mortar box about six feet long and four feet wide, falling over upon her. No one saw it fall, but the child was heard to scream and was found lying flat on the ground on her face with the box lying over her. It was inferable from the evidence that the mortar box had been stored in the yard on its edge so that it might easily be caused to fall in the manner in which it did fall.

"Two important questions in the case are, whether there was evidence to justify a jury in finding that the infant plaintiff was invited by the owner of the premises, the defendant, to use the yard as a playground, and, secondly, if so, whether there was evidence to justify the jury in further finding that the fall of the box was due to any negligence that could be brought home to the defendant company. Both of these questions turn to some extent upon questions of authority, expressly or impliedly, or ostensibly conferred upon the defendant as its agent.

"The defendant is the owner of the property. It turned over the management of the property to another corporation called the Progressive Investment Company, which seems to have been engaged in the real estate business, as its agent, to manage and control the house and apartments and collect the rents, and generally attend to the usual details of the landlord's agent. That corporation had an employe named Rashkober, who was entrusted, as the jury might find, with the duty of collecting rents and attending to repairs. He also undertook to settle disputes among the tenants. He seems to have lived there on the premises, or next door, or near by, so that he was readily accessible to tenants. In addition to this, there was a janitress of the building named Mrs. Leise, who also seems to have taken more or less part in the renting of the premises, especially in showing rooms and in the preliminary negotiations for rental. There are various circum-

stances in the case which bear both on the question of agency and of negligence, and therefore are recited together.

"We think it sufficiently appears as a jury question that the rooms were rented to the Burnetts with a specific privilege of the yard for their children. The evidence indicates that Mrs. Burnett, who went to arrange for the rental, dealt with the janitress, who offered her the second floor rooms, and Mrs. Burnett refused to take them, and insisted on the ground floor on account of the children. She said that she told the janitress at the time that she was moving from the second floor. There was no denial that the children played in the yard without objection. The mortar box, and a quantity of other impedimenta, such as planks and garden tools, belonged to, or were in the possession of, another tenant of the building named Weissman, who caused them to be put in the yard. As soon as the mortar box and these other articles came into the yard, Mr. Burnett complained to Rashkoher on the ground that the yard was for the children, and, according to the testimony, Rashkoher said that he would see Weissman at once in the matter. It appears that he did see Weissman and had a dispute with him on the matter of storing these articles in the yard. It also appears that Burnett announced his intention of making complaint at the office of the agents, and that Rashkoher told Burnett that it was his (Rashkoher's) business. It further appears that on one occasion when Burnett had an errand at the office of the Progressive Investment Company about his rent book, he was informed that Rashkoher was the agent, and that if he did not have rent books the office would furnish them to him. We think that these facts show at least an ostensible agency of Rashkoher and the janitress for the defendant company under the doctrine of *Klitch v. Betts*, 89 N. J. L. 348, and a question for the jury as to whether the plaintiff, in common with the other children, was entitled to use the yard to play in.

"The case is different from *Saunders v. Realty Company*, 84 N. J. L. 276, in that the lease in the present case was oral, and, as the jury might find, the use of the back yard was under discussion at the time the lease was made and was an

inducement to Mrs. Burnett to take the ground floor rooms instead of rooms on the second floor.

"We, therefore, approach the question whether there was evidence for a jury of negligence on the part of the defendant in permitting the box put in by Weissman to remain in the yard an unreasonable time after the defendant had notice, or should in the ordinary course of things have taken notice that it was there and was likely to be dangerous to children using the yard. That it was a menace to children is plainly a jury question, from the fact that it fell over on one of the children, and could not have done so because of its weight, some four hundred pounds, unless it was balanced in a position to be easily upset.

"Now, as to the question of notice and reasonable time, the jury was entitled to find that the box came in the yard on Tuesday afternoon about twenty-four hours before the accident; that Burnett, the father, saw the box and other articles, and complained almost immediately to Rashkober, who, as already stated, lived in the building or next door. The basis of the complaint is not entirely clear on the evidence, whether it was an obstruction to the yard or the foul odors from the lumber, which consisted of old stable planking, or the danger to children. It does appear, however, that Burnett said to Rashkober on that occasion: 'Here is a box weighs about four hundred pounds lies in the yard now.' I says, 'I want this stopped. When I hired the house I had Mrs. Leise, the janitress, take a lamp and show us the yard.' I said: 'A little boy was hurt when we lived on the second floor, and that is what I hired this yard for.' He said, 'I will go up and see Weissman.' And he came back and said: 'Well, I have been up and told Weissman I wanted this stopped, and Weissman said, "My boy put the box in the yard."' "

"Burnett testified that he had complained to Rashkober some nine days or two weeks before, when Weissman first began to put implements into the yard, and that the above conversation was later when the box came in. From this, and the other evidence, we conclude that it was at least an inference for the

Burnett v. Superior Realty Co.90 N. J. L.

jury that Rashkoher was notified that the premises were rendered unsuitable, if not, indeed, dangerous, for children.

"The only remaining question is whether the jury was entitled to say that there was an unreasonable delay in removing the box or rendering the yard safe. The case does not present the question of reasonable time for discovery of the box in the absence of express notice, as in *Timlan v. Dilworth*, 76 N. J. L. 568, but of reasonable time after notice within which the conditions might and should have been remedied. As the jury might find, about twenty-four hours elapsed after notice of the dangerous condition; the obstruction of the yard began apparently some nine days before and seemed to have been farming utensils that might be dangerous in themselves to children. As on the other branches of the case, we think that the question of unreasonable delay in attending to the matter was also for the jury.

"This result disposes of the questions arising on the motion to nonsuit and to direct a verdict for the defendant; and as no other trial errors, if existing, are adequately presented, we conclude that the judgment below must be affirmed.

"Mr. Justice Bergen concurs."

For the respondents, *Peter Steinsitz*.

For the appellant, *James P. Mylod*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, WHITE, HEPPELHEIMER, WILLIAMS, TAYLOR, GARDNER, J.J. 12.

For reversal—None.

90 N. J. L.Cooney v. Rushmore.

MICHAEL J. COONEY, RESPONDENT, v. SAMUEL W. RUSHMORE ET AL., APPELLANTS.**Argued March 20, 1917—Decided June 18, 1917.**

On appeal from the Supreme Court, in which court the following memorandum was filed by Mr. Justice Bergen :

"The prosecutor caused a petition, praying compensation for injuries as authorized by the Workmen's Compensation act, with an order of the court fixing the day for hearing, to be served on the defendant. The only answer interposed was that the petition was not filed with the clerk of the Court of Common Pleas within one year after the accident. This the Court of Common Pleas sustained and made an order dismissing the petition, which action is now under review, the record having been brought here by a writ of *certiorari* allowed the petitioner. The facts are not disputed and show that the accident, the basis of the prosecutor's petition, happened on March 9th, 1914, and that his petition was presented to the judge of the Court of Common Pleas March 8th, 1915, who on that day made the following order: 'A petition having been filed in this cause by Michael J. Cooney, petitioner, praying for the compensation, payable by Samuel W. Rushmore, the respondent, it is on this 8th day of March, 1915, on motion of John P. Owens, attorney for petitioner:

" 'Ordered, that the hearing of said matter be and hereby is set down for Friday, the 3d day of April, 1915, at the court house, in the city of Elizabeth, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard. And it is further ordered, that a true, but uncertified copy of this order, together with a copy of the petition, upon which this order is issued, be served upon the respondent, within six days after the date of this order.' After the order was signed, it and the petition was given to the sheriff of the county of Union to be served on the defendant. It was properly served on March 8th, 1915, but the sheriff did not return the original

Cooney v. Rushmore.

90 N. J. L.

petition and order to the clerk until March 10th, 1915, who marked it filed as of that date.

"The only question to be determined is whether the petition is to be considered as filed on March 8th, when it was presented to the judge of the court, for if it was, then the order under review and the judgment thereon should be set aside.

"The return made by the sheriff was not a filing of the petition and order, for he had no authority to do more than make a return of the character of the service he had made.

"Section 18 of the Workmen's Compensation act, 1911 (*Pamph. L.*, p. 134), provides that in case of dispute concerning the claim of an injured employe, 'either party may submit the claim' to a judge of the Court of Common Pleas of the county, who is empowered to hear and determine the dispute in a summary manner. The method of procedure appears in section 20 of the act, as amended in 1913 (*Pamph. L.*, p. 302), which, after providing that either party may present a petition, declares that 'upon the presentation of such a petition the same shall be filed with the clerk of the Court of Common Pleas, and the judge shall by order fix a time and place for the hearing. * * * A copy of said petition and order shall be served as summons in a civil action and may be served within six days thereafter upon the adverse party,' and the last paragraph of the amending act of 1913 provides that all such claims 'shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under this act, or unless within one year after the accident one of the parties shall have filed a petition for the adjudication of compensation as provided herein.'

"While the statute is perhaps not as definite on the subject as it might be, I am of opinion that while the proceeding is statutory, the jurisdiction in these matters is conferred on the Court of Common Pleas and not on the judge, for although the petition must be presented to a judge of that court, the record is that of the court; the petition is to be filed with the clerk of the Court of Common Pleas, and the judgment is to be entered in that court, on the findings of the judge, the same

90 N. J. L.

Cooney v. Rushmore.

as in cases tried in that court, while section 21 of the act provides that the compensation may be commuted by said 'Court of Common Pleas,' and to make the statute consistent and workable, we must assume that the legislature, in providing this new method of compensation and the means for its enforcement, vested the jurisdiction in the Court of Common Pleas, and not in a judge of that court as a distinct tribunal. The case of *Hendrickson v. Public Service Railway Co.*, 87 N. J. L. 366, is not applicable to the present situation, for, in that case, the court made an order that the petition be filed with the clerk of the Court of Common Pleas, and this was not done within the year, nor does it appear that any order was made declaring that the petition was filed and fixing a time for hearing. The decision in that case was put upon the ground that neither the judge or the petitioner considered the presentation of the petition as a filing; in fact, the contrary appeared for the court made an order that it be filed.

"In the case under consideration the court, after the presentation of the petition, acted upon it as if filed with the clerk, and stated in the order that it had been filed. The orderly proceeding under this statute seems to be the presentation of the petition to the judge, its filing with the clerk of the Court of Common Pleas, followed by the making of the order by the judge fixing a day for hearing. In this case the petition was presented to the judge, and he certifies that it was filed and thereupon made the order fixing the date for hearing, which he could only make after the petition was filed with the clerk. The certificate of the judge that the petition was filed is, in my judgment, just as effective as if he, as the judge of the Court of Common Pleas, had endorsed the date of filing on the petition. When the petition was presented, adjudged to be on file, and the order made fixing the day of hearing, the petition and order passed beyond the petitioner's control and he could not, at least without an order, withdraw them from the files. The fact that the clerk did not endorse on the petition the date of filing is, in my judgment, of no consequence, if it was in fact filed with the clerk of the court, as the judge thereof determined before he acted on it.

Cooney v. Rushmore.

90 N. J. L.

"The statute must be given a reasonable construction, and when a petition is presented to the judge of the court, and he not only certifies that it has been filed, but acts upon it as he only could after it was filed, the petition becomes a record of the court from that date, and is to be taken as filed with the clerk of the court at the time when the court certifies that it was filed. The only other difficulty presented is, that the original petition and order were removed from the files and given to the sheriff in order that he might make service of a copy thereof. As the petition and order constitute the only writ or process in actions of this kind, they were probably taken by the sheriff to be exhibited to the defendant in case of personal service, but, if this was not necessary, the petitioner cannot be deprived of his rights arising from the filing because the sheriff made such a temporary use of the petition and order. Both were served within the year, and the defendant then had notice that such a petition had been filed, for the order so stated, and also that he was required to answer. The endorsement made by the county clerk on March 10th, 1915, indicated the date of the filing of the return by the sheriff. My opinion is that, where the petition is presented to the judge of the Court of Common Pleas, and he certifies that it has been filed and thereupon makes an order which he can only make after such filing, the petition must be taken to have been filed on the date certified by the court, and that in this case the petition was filed within a year after the accident, and therefore the order and judgment of the Court of Common Pleas now under review should be set aside."

For the respondent, *Fort & Fort*.

For the appellants, *Kalisch & Kalisch*

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Bergen in the Supreme Court.

90 N. J. L.

Duffy v. Paterson.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

WILLIAM J. DUFFY, APPELLANT, v. THE MAYOR AND ALDERMEN OF THE CITY OF PATERSON ET AL., RESPONDENTS.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Ward & McGinnis*.

For the respondents, *Edward F. Merrey*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in *Wilhelmina Koettgen v. Mayor and Aldermen of the City of Paterson et al.*, No. 149 of the present term of this court, *post* p. 698.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

Durkin v. Fire Com'rs of Newark.90 N. J. L.

MICHAEL J. DURKIN, APPELLANT, v. BOARD OF FIRE
COMMISSIONERS OF THE CITY OF NEWARK, RE-
SPONDENT.

Submitted March 28, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, whose opinion is re-
ported in 89 N. J. L. 468.

For the appellant, *Frank E. Bradner*.

For the respondent, *Harry Kalisch*.

PER CURIAM.

The judgment under review herein should be affirmed, for
the reasons expressed in the opinion delivered by Mr. Justice
Kalisch in the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, TREN-
CHARD, PARKER, BERGEN, BLACK, WHITE, HEPPENHEIMER,
WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

EDWARD I. EDWARDS, COMPTROLLER OF THE TREASURY,
APPELLANT, v. FREDERICK PETRY, JR., RESPONDENT.

Submitted March 15, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following
per curiam was filed:

90 N. J. L.

Edwards v. Petry.

"This is a writ of *certiorari* to review an order made by Mr. Justice Trenchard, under chapter 120 of the laws of 1915, providing for an order by a justice of the Supreme Court to enforce rights under the Civil Service act.

"The sole question argued by the prosecutor was as to the power of the legislature to delegate to a justice of the Supreme Court this right to review.

"In the present case the defendant appealed to the civil service commission and met with an adverse decision, and thereupon applied to Mr. Justice Trenchard and secured an order reversing the action of the commission.

"We do not find in the case that Mr Justice Trenchard went further than to issue a rule to show cause on the comptroller, and the power to issue the writ was therefore challenged *in limine*. This involves the questions that were discussed in this court in *New Brunswick v. McCann*, 74 N. J. L. 171; *Newark v. Kazinski*, 86 *Id.* 59, and *Summit v. Iarusso*, 87 *Id.* 403.

"We think that while the case presents some difficulty we are bound, nevertheless, to follow the last two cases, which seem to us controlling.

"We think that the jurisdiction given to the justices of the Supreme Court, by the act under consideration, in no way interferes with the right of the Supreme Court to review the entire case by *certiorari*, but superadds an additional step in a proceeding which may ultimately reach this court as a reviewing tribunal.

"We are not to be understood as approving of this character of legislation which quite insidiously results in unsettling the legal machinery of the court without gaining ultimately any substantial advantage to the litigant by the disarrangement.

"We think this writ must be dismissed."

For the appellant, *John W. Wescott*, attorney-general.

For the respondent, *Linton Satterthwaite*.

Erie Railroad Co. v. Public Utility Board. 90 N. J. L.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, GARRISON, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 9.

For reversal—None.

ERIE RAILROAD COMPANY, APPELLANT, v. BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL., RESPONDENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 57.

For the appellant, *Collins & Corbin*.

For the respondents, *L. Edward Herrmann* and *Edward F. Merrey*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

90 N. J. L. Erie Railroad Co. v. Public Utility Board.

ERIE RAILROAD COMPANY, APPELLANT, v. BOARD OF
PUBLIC UTILITY COMMISSIONERS ET AL., RE-
SPONDENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, whose opinion is re-
ported in 89 N. J. L. 57.

For the appellant, *Collins & Corbin*.

For the respondents, *L. Edward Herrmann* and *Edward F. Merrey*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

JAMES FAGAN, JR., APPELLANT, v. BOARD OF FIRE COM-
MISSIONERS OF THE CITY OF NEWARK, RESPONDENT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Frank E. Bradner*.

For the respondent, *Harry Kalisch*.

Fennan v. Atlantic City.90 N. J. L.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court, *eo nomine Durkin v. Fire Commissioners of Newark*, 89 N. J. L. 468.

For affirmance—THE CHANCELLOR, GARRISON, TRENCARD, PARKER, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

WILLIAM H. FENNAN, APPELLANT, v. CITY OF ATLANTIC CITY ET AL., RESPONDENTS.

Argued March 7, 1917—Decided July 18, 1917.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 435.

For the appellant, *Bourgeois & Coulomb*.

For the respondents, *Harry Wootton*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L.Fennan v. Atlantic City.

WILLIAM H. FENNAN, APPELLANT, v. CITY OF ATLANTIC
CITY ET AL., RESPONDENTS.

Argued March 7, 1917—Decided July 18, 1917

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 435.

For the appellant, *Bourgeois & Coulomb*.

For the respondents, *Harry Wootton*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

WILLIAM H. FENNAN, APPELLANT, v. CITY OF ATLANTIC
CITY ET AL., RESPONDENTS.

Argued March 7, 1917—Decided July 18, 1917.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 435.

For the appellant, *Bourgeois & Coulomb*.

For the respondents, *Harry Wootton*.

Fennan v. Atlantic City.90 N. J. L.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

WILLIAM H. FENNAN, APPELLANT, v. CITY OF ATLANTIC CITY ET AL., RESPONDENTS.

Argued March 7, 1917—Decided July 18, 1917.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 435.

For the appellant, *Bourgeois & Coulomb*.

For the respondents, *Harry Wootton*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L.Fennan v. Atlantic City.

WILLIAM H. FENNAN, APPELLANT, v. CITY OF ATLANTIC
CITY ET AL., RESPONDENTS.

Argued March 7, 1917—Decided July 18, 1917.

On appeal from the Supreme Court, whose opinion is reported in 88 N. J. L. 435.

For the appellant, *Bourgeois & Coulomb*.

For the respondents, *Harry Woolton*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

D. FULLERTON & COMPANY, APPELLANT, v. BOARD OF
PUBLIC UTILITY COMMISSIONERS ET AL., RE-
SPONDENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

Fullerton & Co. v. Public Utility Board.

90 N. J. L.

"In this case there are eight reasons presented to the court for setting aside the order made by the board of public utility commissioners. They are, however, argued under four points in prosecutor's brief.

"The first point argued is that the order, if construed to require prosecutor to make changes in its building necessary to have the same conform to the side track of the Erie railroad, when reconstructed, is invalid, because the prosecutor is not a public utility and the board has no power to order it to make such changes.

"The second point argued is that the order, if construed to require the prosecutor at its own expense to reconstruct the existing side track, it is without the jurisdiction of the board. The work commanded to be done by the order in altering the crossing is specifically (a) the changing of the highways and (b) the reconstruction of the railroad.

"The third point argued is, the order under review takes the private property of the prosecutor for public use, without just or any compensation, and takes the property of the prosecutor for private use of other companies.

"The fourth point argued is the order under review takes the property of the prosecutor without due process of law and deprives the prosecutor of the equal protection of the law. All these points are disposed of in the opinion of the court in the case of Erie Railroad Co. v. Board of Public Utility Commissioners.

"The order under review will be affirmed, with costs."

For the appellant, *Hudson & Joelson*.

For the respondents, *L. Edward Herrmann* and *Frank H. Sommer*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

90 N. J. L.

Grandi v. Brunetti.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

ANTONIO GRANDI ET AL., RESPONDENTS, v. NICOLA BRUNETTI, APPELLANT.

Argued March 15, 1917—Decided March 15, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“The reasons for appeal present for our determination either matters of fact, which are not brought before us for consideration on a merely appellate proceeding, or matters of law which have long been settled in this state, and settled adversely to the contention of appellant’s counsel.

“The judgment under review will be affirmed.”

For the respondents, *Themistocles M. Ungaro*.

For the appellant, *Gaetano M. Belfatto*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 10.

For reversal—None.

Grillo v. Edison.90 N. J. L.

SALVATORE GRILLO ET AL., RESPONDENTS, v. THOMAS
A. EDISON ET AL., APPELLANTS.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"This case, which was tried before the District Court without a jury, resulted in a judgment against the defendant Thomas A. Edison, Inc. The trial court found from the proofs that substance flowing from this defendant's plant through its artificially constructed channel into the stream created a condition that was injurious to health and property. Touching this finding the appellant says: 'The learned judge's finding of fact is correct, but his conclusion of law is erroneous.' The legal ruling of the trial court that is complained of is the denial of the appellants' motion to direct a verdict in its favor. This motion does not stir the question of the measure of damages, and, its denial presenting only the question of the liability of the defendant, the motion was properly denied.

"The substances put into the stream by the defendant were the proximate and efficient cause of the injury to the plaintiff. The circumstance that the sulphuric acid already in the stream contributed to this result does not absolve the defendant; and this is equally true whether the acid was a natural ingredient of the stream or was artificially introduced by strangers to this suit.

"*Weidmen Silk Dyeing Co. v. East Jersey Water Co.*, 91 *Atl. Rep.* 338, was an action for the unlawful abstraction of water from a stream. The contention there, as here, was that the injury was created in part by the acts of others than the defendant, in that they polluted the water. In that case, in declining to give the desired force to this argument, we said: 'The abstraction was a direct and proximate cause of the injury, though alone it would not have caused it,' citing *New-*

90 N. J. L.

Grillo v. Edison.

man v. Fowler, 37 N. J. L. 89; *Matthews v. Delaware, Lackawanna and Western Railroad Co.*, 56 Id. 34, and referring to 38 Cyc. 488.

"The subsequent reversal of the judgment (88 N. J. L. 400) was upon a totally different ground, and in the case upon which such reversal rested, viz., *Augur & Simon, &c., v. East Jersey Water Co.*, Id. 273, it was said, by Mr. Justice Bergen, speaking for the Court of Errors and Appeals: 'It is no answer to an action for a nuisance to show that a great many others are committing the same species of nuisance upon the stream; for if the defendant's acts appreciably add to the pollution they create a nuisance.' The difference between a nuisance created by the concurrence of pollution of the stream and the abstraction of its waters does not differ in principle from a nuisance created by a chemical reaction between a substance already in the stream and one placed therein by the act of the defendant. Upon the question, therefore, of liability, which is all that was presented by the motion to direct a verdict, the trial court committed no error in the denial of such motion.

"The question of the measure of damages is not before us upon an appeal from this ruling. The judgment of the District Court is affirmed, with costs."

For the appellants, *McCarter & English*.

For the respondents, *John Larkin Hughes*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons fet forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, WHITE, HEPPELHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

GIOVANNINA GUARRAIA, RESPONDENT, v. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“In this case we dismissed the appeal on the ground that the printed case did not set forth the rules to show cause why a new trial should not be granted in the District Court, and especially whether such rules reserved the points of law taken at the trial; the statute requiring that there be such a reservation to support an appeal. *Comp. Stat.*, p. 2017, § 213. The petition for rehearing sets up that such reservation was made, and on June 26th we heard counsel, and the cases were reinstated, so far as omission of the rules to show cause and reservations are concerned; but there remained the motion to dismiss the appeal made on the further ground that the state of the case was not filed within the fifteen days specified in the statute.

“If this point is resolved against the respondent, then we consider the merits of the appeal.

“We think the failure to file the transcript within fifteen days after judgment was waived by the service and acceptance of the printed state of the case and the limitations of objection thereto that certain documentary evidence had not been printed which was afterwards supplied. Taking this view, the application to dismiss falls, and we are brought to a consideration of the merits.

“The defence was breach of warranty, misrepresentation and concealment of facts, and the errors relate to the refusal of the court to direct a verdict and also instructions to the jury. Among the statements subscribed by insured in the application were declarations that he had not had bronchitis, and whether he had been attended by a doctor within a certain

90 N. J. L.

Guarraia v. Metropolitan Life Ins. Co.

period. These statements were for the most part printed and stated that he had not had various diseases catalogued therein 'except' (and here follows a blank for a statement of the exceptions). No exceptions were stated and the claim is that this amounted to a definite statement on his part that he had not had any of the diseases mentioned. On the other hand, it is urged that they were simply incomplete answers which were accepted by the company without any insistence upon completion. The trial court so held in denying a motion to direct. We do not take this view, but, on the contrary, think that the silence with respect to the exception should properly be taken as a statement that there is no exception; and, consequently, if the insured had in fact had one or another of the diseases there was a false statement with respect to that fact. The question then is with reference to the effect of the statement. If it was a warranty the policy falls; if it was only a misrepresentation, the question of intentional falsehood becomes material. The policy says: 'All statements by the insured shall, in the absence of fraud, be deemed representations and not warranties.' The result of this seems to be that they are made the legal equivalent of representations in any case and we must look for fraud in order to vitiate the policy. Here we are met by the fact that the insured was an Italian, apparently not well acquainted with the English language, confronted with an English-speaking doctor, who probably conducted the examination in the usual more or less perfunctory manner and had the insured sign the paper more or less as a matter of form. The judge left it to the jury to say whether there had been intentional misrepresentation. We are inclined to think that this course was right. There is little doubt that the deceased had consumption, or that he probably had chronic bronchitis and probably other diseases, but the terms of the policy require the company to show that he had intentionally misrepresented these matters, and we do not think that this was shown as a court question. This disposes of the motion to direct.

"The next point is that the plaintiff failed to show any proof of death. There was no formal proof of it, but the

Guarraia v. Metropolitan Life Ins. Co.90 N. J. L.

plaintiff relied on a letter of the insurance company declining to pay the policy because it had been procured in fraud or misrepresentation, and claimed that this was a waiver of the proof of death. This is attacked on the authority of an unreported opinion of a justice in this court which is quoted in the brief. We do not know the facts in that case and cannot tell whether it covers the present situation, but are inclined to say that under the terms of this policy such a letter may be considered a waiver. The policy fixes no time in which the proofs of death are to be submitted, so that they could be presented within any reasonable time; and, consequently, when some three months after the death, the lawyer wrote to the company asking whether the claim was going to be paid and the company said: 'No, we don't propose to pay because the policy was procured in fraud;' it should not be held necessary for the claimant thereafter to put in proofs which would be entirely nugatory.

"The next point is that the judge erred in charging the jury, in effect, that in order to vitiate the policy it must appear that the deceased was knowingly stating a falsehood to the company. This is in line with what has been said. Finally, it is stated that there was error in excluding certain prescriptions. These, if evidential, would have tended to show that the deceased had in fact consumption or bronchitis or what not. In the view we take of the case, it may be assumed that he did, and on that assumption the error would become harmless.

"These views lead to an affirmance of the judgment."

For the appellant, *McCarter & English*.

For the respondent, *John J. Stamler*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

90 N. J. L.Guarraia v. Metropolitan Life Ins. Co.

- *For affirmance*—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

GIOVANNINA GUARRAIA, RESPONDENT, v. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *McCarter & English*.

For the respondent, *John J. Stamler*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in *Guarraia v. Metropolitan Life Insurance Co.*, No. 120 of the present term of this court, *ante* p. 682.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

Gude Co. v. Newark Sign Co.

90 N. J. L.

O. J. GUDE COMPANY, NEW YORK, A CORPORATION, RESPONDENT, v. NEWARK SIGN COMPANY, A CORPORATION, NEWARK BILL POSTER ADVERTISING COMPANY, A CORPORATION, THOMAS F. J. KELLY, HUGH J. KAVNEY, SAMUEL PRATT AND MICHAEL J. CULLEN, APPELLANTS.

Argued March 19, 1917—Decided May 24, 1917.

On appeal from the Supreme Court.

For the appellants, *Kalisch & Kalisch*.

For the respondent, *Lum, Tambllyn & Colyer*.

PER CURIAM.

This was an action in the Supreme Court. The complaint alleges that the plaintiff has been, and is, in the sign advertising business in general; that the defendant corporations were engaged in the same business and were, and are, its competitors and rivals throughout the city of Newark and the surrounding territory; that Kelly and Kavney were officers, directors and employes of each of the defendant companies and were actively engaged in the conduct, management and promotion of the business of each, and of their rivalry and competition with the plaintiff; that they, with Pratt and Cullen, maliciously intending to harass, annoy and embarrass the plaintiff in the carrying on of its business, damaged and destroyed its signs and property, and caused dissatisfaction among its customers; and to injure and drive it out of business, &c., maliciously conspired, combined and agreed to damage and destroy its signs and property, and to cause dissatisfaction among its customers, and in pursuance of this design the defendants chopped down, sawed off, burned and otherwise mutilated and injured the signs of the plaintiff, to its damage.

At the trial in the Essex Circuit the jury rendered a verdict in favor of the plaintiff against the defendants (except Cullen, as to whom the plaintiff took a nonsuit). From that verdict a rule to show cause was allowed with reservation of exceptions. The rule was discharged and the case is here on appeal on the reserved exceptions.

There were many grounds of appeal relied on by the appellants, but for the purpose of disposing of the matter before us only those grounds need be considered which have reference to certain transactions and a certain controversy between the New Jersey Sign Advertising Company (which is not a party to this suit) and three of the defendants in this suit, namely, Samuel Pratt, Newark Sign Company and Newark Bill Poster Company; evidence of which transactions and controversy the court received in evidence and referred to in his charge to the jury, over the objection of the defendants.

In offering this evidence, the plaintiff sought to show that the above-mentioned three defendants in an earlier suit brought against them by the New Jersey Sign Advertising Company in January, 1913, were charged with the commission of acts similar to those charged against them in the present suit; the complaint in the earlier suit having alleged that the acts were committed in pursuance of an unlawful conspiracy, combination and agreement entered into by the three defendants above mentioned, and that the acts were committed since January 20th, 1907. The record of that suit was offered and received in evidence. This was error.

The record in the suit just mentioned throws no light upon the present controversy. It was a suit based upon an alleged conspiracy entered into in 1907, which was more than seven years before the acts complained of in the suit at bar. The plaintiff in that suit was the New Jersey Sign Advertising Company, and the plaintiff in the case at bar is O. J. Gude Company. The plaintiffs were not the same in each case. It further appears, upon an examination of the record in the former case, that the answer filed by the defendants denied the charges in the complaint and that the suit was never tried,

Gude Co. v. Newark Sign Co.90 N. J. L.

but was discontinued. It cannot be said, that, because the New Jersey Sign Advertising Company, three years before the present suit was commenced, accused three of the present defendants of conspiring, in 1907, to injure it—especially without any verdict in the case to establish the truth of the accusations—that those accusations in that suit afford any light in determining whether like accusations in the present suit are true. It was highly improper to place before the jury the record of the other case. It confused the issues in this case and prejudiced the defendants. It also affected the question of punitive damages. The defendants could not be required to meet the issues in the former suit.

An effort was made to substantiate the charges in the previous suit by the admission of testimony showing that that suit was settled. This was error. As the admission of evidence of the bringing of that suit was error, testimony to the effect that it was settled was equally erroneous.

The trial judge, in dealing with the matter in his charge, said that the jury should consider the earlier suit and the settlement of it as showing that some of the defendants had knowledge that similar charges had been previously made. This, too, was error, for, as neither the bringing nor settlement of that suit was competent evidence for the plaintiff, it follows that the jury could not lawfully give consideration to that evidence in the pending suit.

The judgment under review will be reversed, to the end that a *venire de novo* may be awarded.

For affirmance—BLACK, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 5.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, BERGEN, MINTURN, KALISCH, TAYLOR, JJ. 7.

90 N. J. L.Houghton v. Jersey City.

JAMES M. HOUGHTON ET AL., APPELLANTS, v. MAYOR AND
ALDERMEN OF JERSEY CITY ET AL., RESPONDENTS.

Argued March 21, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which court the following memorandum was filed by Mr. Justice Swayze:

“Per curiam: The prosecutors are taxpayers of Jersey City and seek to set aside a contract with Thomas Harrington Sons Company for the removal of garbage. The chief complaint is that the specifications are so drawn as to leave too much to the discretion of the city officers in the enforcement of the contract and to give them too much power for the enforcement of the Eight-Hour Work-Day law. Assuming this to be so, we are unable to see how taxpayers are injured thereby in the absence of proof that prospective bidders were deterred from bidding by the supposed looseness of the specifications. All bidders had the same opportunity to bid on the same specifications, and there seem to have been as many bidders as there was any reason to expect. It is also objected that the successful bid was for five years, and that of the total bid the payment for the balance of the then current fiscal year was less in proportion than the payments for succeeding years, and was just below the amount of the appropriation available for the current year. The bid itself was a lump bid for the five years; the amount payable varied with the years, increasing as time went on. As the contract was an entire contract for the five years, and Thomas Harrington Sons Company were the lowest bidder, we do not see, in the absence of proof, that the prosecutors were injured because the bidder chose to postpone in part the times of payment. The postponement would seem to be to the advantage of the taxpayers in the saving of interest.

“Let the writ be dismissed, with costs.”

Ireson v. Cunningham.90 N. J. L.

For the appellants, *Richard Doherty*.

For the respondents, *Collins & Corbin* and *John Bunting*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, BERGEN, MINTURN, KALISCH, BLACK, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—None.

GEORGE IRESON, RESPONDENT, v. GEORGE CUNNINGHAM,
APPELLANT.

Argued March 6, 1917—Decided March 6, 1917.

On appeal from the Cumberland County Circuit Court.

For the appellant, *Henry S. Alvord*.

For the respondent, *S. Webster Hurd* and *Royal P. Tuller*.

PER CURIAM.

Plaintiff brought suit to recover damages for injuries sustained by reason of a head-on collision, in a public highway, of an automobile driven by the defendant and a horse and wagon driven by the plaintiff. The plaintiff was driving his vehicle without a light and the defendant was driving his automobile with lights, the time being seven P. M. of March 19th, 1914, on which day the sun set at six-eleven P. M. The

90 N. J. L.Ireson v. Cunningham.

statute required plaintiff to carry a light on his wagon from one-half hour after sunset.

The jury returned a verdict for the plaintiff. The judgment entered on the verdict has been brought to this court by appeal. The questions presented by the grounds of appeal are the propriety of a denial of motions to nonsuit and to direct a verdict for defendant, and also objections to the charge of the trial judge in certain respects.

Testimony offered by the plaintiff established that the collision occurred in a roadway wide enough for two vehicles to pass, and that the plaintiff was as far over on the right-hand side as he could get at the time he was run into; that as the automobile approached it wobbled or zigzagged in the road and plaintiff shouted to warn the driver of his presence before the horse was struck; that the time was one of sufficient light to see a wagon or a machine several hundred feet away; that the horse of the plaintiff had to be killed as a result of the injury; that the wagon was somewhat broken and that plaintiff suffered injury.

The testimony justified the jury in believing that the defendant, in violation of the law of the road, failed to turn to the right in order to allow the plaintiff to pass him when they met in the highway. And the jury was justified in believing it was light enough for the defendant to see the plaintiff and that it was his duty to turn out for him; and if, on the contrary, it was too dark for him to see, they could find that it was his duty to be on the right-hand side of the road in the direction in which he was going, so as not to take the chance of running into anyone approaching him from the opposite direction.

Although the plaintiff was driving without a light on his wagon, in violation of the statute, that fact does not operate to prevent his recovery if the defendant could see him, and, if he could, the unlawful act of the plaintiff in no way contributed to the accident. The testimony was certainly susceptible of the construction that the defendant either saw, or by the exercise of due care, could have seen the plaintiff.

Jersey City v. Huber.

90 N. J. L.

The defendant urged before the trial court, and argues here, that the plaintiff was guilty of contributory negligence. If contributory negligence was present in the case, the facts from which it was to be deduced were in dispute, and it was, therefore, a jury, and not a court, question.

The defendant excepted to the charge of the court in several respects, but argues them very meagrely and without citation of any authority. We have examined them and find they are entirely without substance.

The judgment will be affirmed, with costs.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 15.

For reversal—None.

MAYOR AND ALDERMEN OF JERSEY CITY, RESPONDENT,
v. LEWIS P. HUBER, COLLECTOR, ETC., APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, which delivered the following *per curiam* opinion, on *certiorari*, to an assessment for taxation of the pipe line of the Jersey City water-supply:

“Per curiam: The assessment by the borough of Secaucus upon the pipe line is illegal. The statute (*Comp. Stat.*, p. 5084, 4d) authorizes the taxation of real estate without regard to any buildings or other improvements on such lands. This was meant to exclude from the valuation the value added by the improvements.

“The statute authorizes the levying of a tax upon the land only of another municipality. 4 *Comp. Stat.*, p. 5085.

90 N. J. L.

Jersey City v. Huber.

"It is argued that the laches of the officials of Jersey City in failing to attack these assessments, must result in a denial of the city's claim upon that ground. But the rule is otherwise in the public interest, and the doctrine is settled that the laches of an official, charged with the performance of a public duty, cannot operate to bar the municipality he serves from asserting its legal rights. *Jersey City v. North Jersey Street Railway Co.*, 72 N. J. L. 383.

"The result is that the assessments for taxes for the years in question must be vacated."

For the appellant, *Harlan Besson*.

For the respondent, *John Milton*.

PER CURIAM.

The judgment should be affirmed, for the reasons stated by the Supreme Court in its *per curiam* opinion.

It is argued here that the land and pipe line are not exclusively used for water to be supplied and used in Jersey City, but that part of the water obtained through it is sold to corporations and individuals outside of the taxing district, and therefore the exemption fails. To this we do not agree.

The aqueduct was not constructed as a business venture but to take care of the present and future needs of the city and its inhabitants. The pipe was made larger than was immediately necessary in order to provide for growth of the city. The sale of water not at present needed is merely incidental, and the fact of such present sale does not negative the use of the land for the purpose of public water-supply and of the accompanying exemption, so long as said land is reasonably needed for the present or reasonably anticipated future supply of Jersey City for purely public purposes. In *Newark v. Clinton*, 49 N. J. L. 370, there was a separation between the tract used for public purposes and the rest of the land, which is not the condition here.

Meyer v. Public Utility Board.

90 N. J. L.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

JACOB MEYER ET AL., APPELLANTS, v. BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL., RESPONDENTS.

FULLER'S EXPRESS COMPANY, APPELLANT, v. BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL., RESPONDENTS.

MORRIS & COMPANY, APPELLANTS, v. BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL., RESPONDENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"In each of these cases there are eight reasons presented to the court for setting aside the order made by the board of public utility commissioners. They are identical with the reasons presented in the case of D. Fullerton & Company, prosecutor, except in the case of Fuller's Express Company, prosecutor, presents an additional reason, viz., the order directing changes, relocation, &c., is invalid because it imposes a burden upon the interstate traffic of the prosecutor, interferes with and impairs its ability to perform its duty, as a common carrier of such interstate traffic. These cases were argued orally before the court by Mr. Gourley. All the points in these cases are disposed of in the opinion of the court in the case of Erie Railroad Co. v. Board of Public Utility Commissioners. The order under review will be affirmed, with costs."

90 N. J. L.Koenigsberger v. Mial.

For the appellants, *William B. Gourley*.

For the respondents, *L. Edward Herrmann* and *Frank H. Sommer*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

FERDINAND H. KOENIGSBERGER, RESPONDENT, v. KATE A. MIAL, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF HENRY H. HANKINS, DECEASED, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“This is an appeal from a judgment entered by default against the defendant in an action brought by the plaintiff to recover for architect’s fees alleged to be due him on a building operation. Originally, the suit was brought against Kate A. Mial, individually, and Leonidas L. Mial, as executor of Henry H. Hankins, deceased. The complaint was filed in September, 1913. Subsequently, and in March, 1914, application was made on behalf of the defendants to compel the amendment of the complaint by striking therefrom the name

Koenigsberger v. Mial.

90 N. J. L.

of Leonidas A. Mial, and substituting that of Kate A. Mial, as executrix. The rule directing the amendment required a copy thereof to be served upon Kate Mial within twenty days after its date, and allowed her twenty days after such service within which to file her answer. The date of this rule was March 30th, 1914. The amended complaint was filed on the 15th day of April of that year. On the 15th of May following the defendant moved to strike out certain portions of the amended complaint, for reasons set forth in a notice of the motion which was served upon the plaintiff's attorney on the 5th day of that month. The court took time to consider the motion, and on the 19th day of June filed a memorandum stating that the defendant was entitled to have struck from the complaint the provisions referred to in her notice of motion. No rule was entered pursuant to this finding of the court, and on the 17th of November, 1914, the plaintiff entered judgment by default. The defendant, Kate Mial, thereupon applied for and obtained a rule to show cause why the judgment should not be opened as having been prematurely and improvidently entered. Testimony was taken in support of, and in opposition to, the making of this rule absolute, and in January, 1916, the matter coming on to be heard before the Circuit Court, the rule to show cause was discharged.

"The defendant thereupon appealed to this court.

"We think the judgment under review should be affirmed. On its face it is regular. The defendant is presumed to have had notice of the filing of the amended complaint, because within twenty days after its filing she moved to strike out certain portions thereof. Her failure to enter a rule in accordance with the decision of the Circuit Court in her favor on the motion to strike out certain parts of the amended complaint was, we think, an abandonment of the motion. Having abandoned the motion, and having failed to plead to the amended complaint within the time specified by the order of the court, the plaintiff was entitled to take judgment against her by default. According to the theory of the de-

90 N. J. L.

Koenigsberger v. Mial.

fence, a suit might be perpetually stayed by a defendant by following the course pursued in the present case by Kate A. Mial, the appellant. Without stopping to consider whether, on an appeal from the judgment now under review, the appellant can attack the action of the lower court in discharging the rule to show cause, we are of opinion that the action complained of was proper. If it be true, as counsel suggests, that the failure of the defendant to pursue her defence as required by law was due to the neglect of her attorney, that fact alone did not entitle her to the relief she sought under the rule. She was required, in addition, to show that she had a meritorious defence, and this the Circuit Court considered she had failed to do. Our examination of the testimony submitted under the rule to show cause leads us to the same conclusion.

"The judgment under review will be affirmed."

For the appellant, *Samuel A. Besson*.

For the respondent, *Runyon & Autenreith*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, PARKER, BERGEN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

Koettegen v. Paterson.90 N. J. L.

WILHELMINA KOETTEGEN, APPELLANT, v. THE MAYOR
AND ALDERMEN OF THE CITY OF PATERSON ET AL.,
RESPONDENTS.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

"This writ brings up for review an ordinance passed by the Paterson board of aldermen to license and regulate the public dance halls of that city.

"Our examination leads to the following conclusions:

"1. The authority to pass the ordinance in question is conferred upon the board of aldermen by the provisions of the city charter. If the authority thus conferred is in one or more respects curtailed or superseded by the act of 1913, still the ordinance as a whole cannot be set aside in this proceeding in which no conviction has been had.

"2. The fee fixed by the ordinance is not excessive or unreasonable, in view of the incidental expenses connected with its enforcement, including cost of constant inspection. The fee thus fixed is therefore incident to regulation and not for revenue.

"3. The penalty imposed by the ordinance is authorized by the charter; in the absence of a conviction, and the imposition of any penalty, it is not perceived that the prosecutor is in a position to quarrel with a provision which, if her contention be correct, would not be enforceable in case she violated the ordinance. If separable the whole ordinance will not be set aside. *Shill Rolling Chair Co. v. Atlantic City*, 87 N. J. L. 399.

"4. The ordinance is not an illegal delegation of the charter powers to the mayor. The charter does not require the board of aldermen to license places of amusement; it authorizes them to pass ordinances regulating such places. That they have done, and a part of the regulation thus ordained

90 N. J. L.

Koettgen v. Paterson.

is a license to be obtained in the manner prescribed by the ordinance. The board has not delegated its authority, it has exercised it; the prosecutor has not been refused a license or been convicted for not having one; hence, she has not shown that any injury has come to her from this incident of regulation.

"5. The ordinance is not unreasonable because of its incidental effect upon the business in which the prosecutor is lawfully engaged, hence the fact that the sale of liquors and the receipts of rent for the dance hall fell off after the ordinance went into effect does not render it confiscatory in any legal sense.

"The defendant in *certiorari* contends *in limine* that, inasmuch as there has been no conviction, the ordinance cannot be set aside *in toto* if any of its provisions are at once lawful and separable from those that are challenged, citing *Rosencrans v. Eatontown*, 80 N. J. L. 227; *Newmann v. Hoboken*, 82 *Id.* 275; *Siciliano v. Neptune Township*, 83 *Id.* 158.

"There are in the ordinance such provisions, *e. g.*, the sale of intoxicating liquors, the inspection of dance halls and the revocation of licenses.

"Our conclusion, therefore, is, that in the respects in which it is challenged, the ordinance is valid, and that if it were otherwise, it would not be set aside *in toto* in this proceeding.

"This applies also to the cases in which the prosecutors are: Duffy, the Charles Kruchen Company and the Riverside Turn Verein Harmonie.

"The writs are dismissed, with costs."

For the appellant, *Ward & McGinnis*.

For the respondents, *Edward F. Merrey*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

Kruchen Co. v. Paterson.

90 N. J. L.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

CHARLES KRUCHEN COMPANY, A CORPORATION, APPELLANT, v. THE MAYOR AND ALDERMEN OF THE CITY OF PATERSON ET AL., RESPONDENTS.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Ward & McGinnis*.

For the respondents, *Edward F. Merrey*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in *Wilhelmina Koettegen v. the Mayor and Aldermen of the City of Paterson et al.*, No. 149 of the present term of this court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L. Long Dock Co. v. State Board of Taxes, &c.

LONG DOCK COMPANY, APPELLANT, v. STATE BOARD OF
TAXES AND ASSESSMENT, ETC., RESPONDENT.

Argued March 13, 1917—Decided May 24, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 108.

(In re reassessments on second-class property for 1911.)

For the appellant, *Collins & Corbin*.

For the respondent, *John W. Wescott*, attorney-general, *John Bentley* and *John R. Hardin*.

PER CURIAM.

Legal questions were first dealt with in the opinion of Mr. Justice Parker in the court below, so as to lay a foundation for the consideration of the facts, and those questions were, in our opinion, rightly decided. As there was evidence to support the finding of facts made by the Supreme Court, that finding is not reviewable in this court.

The judgment under review will be affirmed.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

Long Dock Co. v. State Board of Taxes, &c. 90 N. J. L.

LONG DOCK COMPANY, APPELLANT, v. STATE BOARD OF
TAXES AND ASSESSMENT, ETC., RESPONDENT.

Argued March 13, 1917—Decided May 24, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 108.

(In re reassessments on second-class property for 1912.)

For the appellant, *Collins & Corbin*.

For the respondent, *John W. Wescott*, attorney-general,
John Bentley and *John R. Hardin*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in *Long Dock Co. v. State Board of Taxes and Assessment, &c.*, No. 48 of the present term of this court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

LONG DOCK COMPANY, APPELLANT, v. STATE BOARD OF
TAXES AND ASSESSMENT, ETC., RESPONDENT.

Argued March 13, 1917—Decided May 24, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 108.

90 N. J. L. Long Dock Co. v. State Board of Taxes, &c.

(In re reassessments on second-class property for 1913.)

For the appellant, *Collins & Corbin*.

For the respondent, *John W. Wescott*, attorney-general,
John Bentley and *John R. Hardin*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in Long Dock Co. v. State Board of Taxes and Assessment, &c., No. 48 of the present term of this court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

LONG DOCK COMPANY, APPELLANT, v. STATE BOARD OF
TAXES AND ASSESSMENT, ETC., RESPONDENT.

Argued March 13, 1917—Decided May 24, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 108.

(In re reassessments on second-class property for 1914.)

For the appellant, *Collins & Corbin*.

For the respondent, *John W. Wescott*, attorney-general,
John Bentley and *John R. Hardin*.

Loveland v. McKeever Bros.90 N. J. L.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in Long Dock Co. v. State Board of Taxes and Assessment, &c., No. 48 of the present term of this court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

BENJAMIN F. LOVELAND, RESPONDENT, v. MCKEEVER
BROTHERS, INCORPORATED, APPELLANT.

Argued March 20, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *James Mercer Davis*.

For the respondent, *Griffin & Griffin*.

PER CURIAM.

The defendant is the owner of Crab Island, situate in Little Egg Harbor bay, Ocean county, New Jersey, on which it has a plant for the rendering of menhaden fish, caught in the Atlantic ocean. In the conduct of this business, the defendant employed the plaintiff at a salary of \$200 per month, from the 22d day of July, 1911, until the 24th day of July, 1915. From July 24th, 1915, until March 31st, 1916, the plaintiff drew wages at the rate of \$50 per month. Plaintiff's salary not having been paid, suit was entered against the defendant for the entire amount accruing to the plaintiff

90 N. J. L.Loveland v. McKeever Bros.

from the date of his employment until his discharge on the date last mentioned, and, also, the plaintiff sued for certain moneys which he had expended on behalf of the defendant, at its request, claiming in all a balance of \$7,015.84.

The defendant filed an answer and counter-claim. The answer set up that the plaintiff agreed to devote his exclusive services to the care of defendant's plant; that in violation of his agreement he neglected or refused to perform those services for long periods of time, and instead devoted himself to private enterprises of his own; and that defendant had paid plaintiff, pursuant to the contract, various sums aggregating \$7,600. By way of counter-claim the defendant alleged that the plaintiff wrongfully engaged in private business of his own and obtained the services of certain employees of the defendant to assist him in it, and charged their compensation to the defendant's pay-roll; that plaintiff, at various times, used a boat belonging to defendant in his private business, and damaged the defendant thereby; that plaintiff so negligently and carelessly performed his duties as superintendent of defendant's plant that defendant sustained damage. The total amount demanded in the counter-claim was \$7,700.

The case was tried in the Burlington County Circuit Court without a jury. The trial judge filed the following memorandum:

"CARROW, J. I find that the plaintiff properly performed his contract and is entitled to recover his unpaid compensation, less \$90 for the use of the 'Green Garvey' and \$24 for the use of defendant's men.

"The amount which I find is due from defendants to plaintiff is \$2,395.82."

From the judgment entered upon this finding the defendant has appealed to this court. The grounds of appeal are as follows: 1. Because the court refused to grant defendant's motion for a nonsuit upon the evidence for the plaintiff given at the trial. 2. Because the court refused to give judgment for defendant, although it should have done so on the evi-

Loveland v. McKeever Bros.90 N. J. L.

dence given at the trial. 3. Because the amount of the judgment was excessive. 4. Because the finding of the court was against the clear weight of the evidence.

The first two grounds of appeal are unavailing to the appellant if there be any evidence to support the finding of the trial judge. It has been repeatedly held that this court will not review the findings of fact in a court below beyond ascertaining that there was evidence to support such findings. See *Larned v. MacCarthy*, 85 N. J. L. 589; also *Eberling v. Mutillod* (*Court of Errors and Appeals*), ante p. 478. An examination of the testimony returned with the record shows that there was evidence entitling the plaintiff to recover at the close of his case, and that the case was in the same posture when both sides rested; therefore, the trial judge was justified in denying the motion to nonsuit, and also in finding for the plaintiff.

The third and fourth grounds of appeal are equally valueless to the appellant. Excessive damages can only be reduced, and a verdict set aside because against the weight of the evidence, on rule to show cause in the court in which the trial was had; even the legislature is powerless to confer upon this court the right to set aside verdicts because against the weight of evidence, or to reduce them because excessive. *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647.

The judgment under review must be affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

90 N. J. L.

Maxwell v. Edwards.

LAWRENCE MAXWELL ET AL., EXECUTORS, ETC., OF LAST WILL OF JAMES McDONALD, DECEASED, APPELLANTS, v. EDWARD I. EDWARDS, STATE COMPTROLLER OF THE TREASURY OF NEW JERSEY, ET AL., RESPONDENTS.

Argued March 13, 1917--Decided June 18, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 446.

For the appellants, *Coult & Smith (Edward De Witt, of New York)*.

For the respondents, *John W. Wescott, attorney-general, and John R. Hardin.*

PER CURIAM.

The constitutionality of the act of April 9th, 1914 (*Pamph. L., p. 267*), amending the Inheritance Tax law of April 20th, 1909 (*Pamph. L., p. 325*), has been sustained by the Supreme Court in an opinion by Mr. Justice Minturn. *Maxwell v. Edwards*, 89 N. J. L. 446.

Nothing need be added thereto, on the constitutionality of the act, but it is important that the facts illustrating the method by which the transfer inheritance tax was levied in this case may be amplified somewhat, thus the return to the writ of *certiorari* shows the appraised value of the entire estate, wherever situate, was ascertained and fixed at \$3,969,333.25. From this amount was deducted \$328,914.04, being the appraised value of the New Jersey stocks specifically bequeathed to the widow and stranger, leaving \$3,640,419.21, from which figure was deducted \$270,813.17, being the amount allowed for debts, administration expenses, &c., leaving a net estate of \$3,369,606.04; from this net estate was deducted legacies bequeathed under the will, together with legacies to beneficiaries in the five per cent. class and the in-

Maxwell v. Edwards.

90 N. J. L.

terest of the widow in the estate, other than New Jersey stocks specifically bequeathed, amounting to \$651,474.25, leaving a residuary estate of \$2,718,131.79.

The appraised value of the New Jersey stocks specifically bequeathed to the widow was ascertained to be \$246,685.53, and the rate of taxation assessed thereon is one per cent., one and one-half per cent. and two per cent., making the tax due this state on this specific bequest to the widow \$3,933.71.

The appraised value of the New Jersey stock specifically bequeathed to the stranger was ascertained at \$82,228.51. and the rate of taxation on the value of this bequest is five per cent., making the amount of tax due \$4,111.42. The appraised value of the New Jersey stocks owned by the decedent at the time of death was \$1,114,965; from this appraised value was deducted the appraised value of the New Jersey stocks specifically bequeathed to the widow and stranger, amounting to \$328,914.04, leaving the net appraised value of the New Jersey property, which formed a portion of the general assets of the estate at \$786,050.96.

The method employed in ascertaining the tax due this state, on the transfer of the shares of stock of the New Jersey corporations not specifically bequeathed, is as follows:

The amount of legacies, &c., passing to beneficiaries taxed at the rate of five per cent. was determined at \$356,761.26, making the tax due thereon at the rate of five per cent. \$17,838.06. The interest of the widow in the estate, other than shares of New Jersey stocks specifically bequeathed, was determined to be \$294,712.99, and the statutory exemption of \$5,000 was deducted and the tax at the rate of two per cent. and three per cent. was \$8,658.24. The residuary estate was taxed as passing to the son and two grandchildren and determined to be \$2,718,131.79, and the statutory exemption of \$5,000 to each, totalling \$15,000, was deducted, and the balance taxed at the rate of one per cent., one and one-half per cent., two per cent. and three per cent., making the tax on the residuary estate \$70,893.95.

The total amount of tax on the interest of the collateral heirs, and the amount passing to the widow, together with

90 N. J. L.Nell v. Godstrey.

the residuary estate passing to the son and grandchildren, as set forth above, total, \$97,390.25.

The percentage or proportion of the New Jersey stocks (not specifically bequeathed), which total \$786,050.96, bears to the entire estate (less specific bequests of New Jersey stocks), which total \$3,640,419.21, was determined to be .2159, thus:

$\$3,640,419.21) \$786,050.96 (.2159$

This percentage or proportion of \$97,390.25, which is the tax that would have been due, if the decedent had died a resident of this state and all his property had been located here, equals \$21,026.55. The total amount of tax, as set forth above, which included the tax on the New Jersey stocks specifically bequeathed to the widow and stranger and the New Jersey stock which forms a portion of the general assets of the estate, totals \$29,071.68, the amount of the tax.

The judgment of the Supreme Court is affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, TRENCARD, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 10.

For reversal—None.

HARRIET NELL ET AL., APPELLANTS, v. WILLIAM C. GODSTREY, RESPONDENT.

Argued March 12, 1917—Decided March 12, 1917.

On appeal from the Bergen County Circuit Court.

For the appellants, *Nathaniel Kent* and *Gilbert Collins*.

For the respondent, *Wendell J. Wright*.

Nell v. Godstreya.90 N. J. L.

PER CURIAM.

This case presents an appeal from a judgment entered in the Bergen County Circuit Court, founded upon a verdict for the defendant directed by the trial judge, to which direction exception was duly taken.

The action was brought by Harriet Nell and her husband, John J. Nell, for injuries alleged to have been sustained by her while a passenger in a taxicab said to have been owned by the defendant and operated and controlled by his agent.

The facts relating to the accident, which was the subject-matter of the suit, were substantially as follows:

The plaintiff Mrs. Harriet Nell, on Saturday, January 15th, 1916, and her sister Miss Josephine McGintee, went from Bogota, New Jersey, where Mrs. Nell lived, to Hackensack, and thence to New York, for the purpose of doing some shopping and visiting the family of one of her husband's employes. They left the home of the persons whom they were visiting at about one-thirty Sunday morning to catch the ferry going to Edgewater, New Jersey. They missed the two o'clock boat and were compelled to take the next boat at two forty-five A. M. When they arrived in Edgewater they found that there would be no car leaving until five o'clock. Mrs. Nell telephoned to her husband and he instructed her to hire a taxicab to take them home. She then asked an officer to get her a taxicab, and he said he would. Within ten or fifteen minutes thereafter Patrick Dowdell came with a taxicab from the Edgewater Garage, and agreed to take them to Bogota for \$3. The plaintiff and her sister then entered the taxicab and were driven along the river edge for about fifteen minutes, until they came to a hill called the Fort Lee hill. When near the top of the hill the car stalled and commenced coasting backwards, whereupon the chauffeur turned his wheel to make the car turn sideways towards the curb, and thus backed the car up against the south curb. After stopping the car he turned the front wheels facing down hill, so as to aid the gasoline, which was low, to run into the carbureter, and started to crank the machine. This he continued doing for

about ten or twelve minutes, when Mrs. Nell opened the window and asked him what the trouble was, and he said that the gasoline had run low and that the radiator was hot. While trying to crank the car it suddenly started down hill with no one at the wheel, the chauffeur trying to hold it back with his hands around the radiator. As it rapidly increased its speed, the chauffeur called to the plaintiff and her sister to jump for their lives. After the car had gone some considerable distance, the plaintiff jumped. Her head struck on the street and she was rendered unconscious, receiving more or less serious injuries.

At the conclusion of the whole case a motion was made to direct a verdict for the defendant upon several grounds, namely, that no negligence had been proved on the part of the defendant; that the negligence specified in the complaint had not been proved; that if any negligence at all appeared in the case, it was not that of the defendant; that Dowdell was not the agent of the defendant; that under the evidence, as it appeared, Dowdell was acting as the agent of the plaintiff, and that the defendant, Godstrey, was not the owner or operator of the car, or in any circumstances, under the evidence, liable for the alleged accident. Whereupon the court made the following observation:

"The point that has been troubling me all through the case is the question as to whether this driver has been acting within the scope of his authority in such a manner as to bind the defendant. That is the situation as I find it now. The burden of proof is upon the plaintiff to show by a fair preponderance of the evidence that the driver was the agent of the defendant, and, at the same time, the act performed was within the scope of his authority. That burden is upon the plaintiff to prove. That is without taking into consideration the other questions involved, of ownership or negligence. If that is disposed of in a manner negative to the plaintiff's case, all the others would fall with it."

Then, after argument by counsel for plaintiff, the court said: "The motion to direct a verdict will be granted," not

Nell v. Godstrey.

90 N. J. L.

putting the decision upon any particular ground. The plaintiff noted an exception.

We think it unnecessary to review the testimony. It is sufficient to say that we are of opinion that the case should have been submitted to the jury, as there was evidence tending to show that the taxicab belonged to the defendant; that the chauffeur, Dowdell, was his agent, and that he, the chauffeur, was negligent. It was claimed on behalf of the defendant that Dowdell exceeded his authority as an employee. If he did, if he violated his instructions, his authority and instructions were not known to the plaintiff. He was apparently the agent of the defendant with authority to drive his taxicab for hire.

These observations dispose of the grounds upon which the motion for the direction of a verdict for the defendant was rested and the point suggested by the trial judge.

It ought, perhaps, to be stated that in the argument on the motion to direct a verdict, counsel for the plaintiff (citing, but not quoting, literally, from *Bennett v. Busch*, 75 N. J. L. 240) said:

"If there is any evidence in the case upon any proposition upon which reasonable men might differ, or any honest man could have a difference of opinion therefrom, then the element must be submitted to the jury."

To which the judge replied:

"I don't think so. If that was the case, why, then, we have nothing in the rule that a verdict is against the weight of the evidence."

It is obvious that the trial judge failed to perceive the distinction between court questions and jury questions arising from evidence. In cases where a new trial is granted because the verdict is against the weight of the evidence, the direction of a verdict at a second trial on the same or similar evidence, where a substantial conflict of testimony is present, is not justified. Conflicting testimony is always for the jury. *Dickinson v. Erie Railroad Co.*, 85 N. J. L. 586. See, also, *Tilton v. Pennsylvania Railroad Co.*, 86 *Id.* 709; *Keeney v. Dela-*

90 N. J. L. N. Y., S. & W. R. R. Co. v. Newbaker.

ware, Lackawanna and Western Railroad Co., 87 *Id.* 505; *Tonsellito v. New York Central and Hudson River Railroad Co.*, *Id.* 651; *McCormack v. Williams*, 88 *Id.* 170.

The judgment under review will be reversed, to the end that a *venire de novo* may be awarded.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, TRENCHARD, BERGEN, MINTURN, KALISCH, BLACK, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 13.

THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, APPELLANT, v. CHARLES J. NEWBAKER, RESPONDENT.

Submitted December 11, 1916—Decided July 18, 1917.

On appeal from the Supreme Court.

For the appellant, *George M. Shipman and Collins & Corbin*.

For the respondent, *William H. Morrow*.

PER CURIAM.

The judgment under review herein should be reversed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the case of *George A. Rounsaville v. Central Railroad Company of New Jersey*, No. 81 of the November term, 1915, recently decided in this court upon the authority of the decision of the Supreme Court of the United States in the case of *Eric Railroad Co. v. Amy L. Winfield* (opinion by Mr. Justice Van Devanter), 244 *U. S.* 170.

Passaic Water Co. v. Public Utility Board. 90 N. J. L.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

PASSAIC WATER COMPANY, APPELLANT, v. BOARD OF
PUBLIC UTILITY COMMISSIONERS ET AL., RESPOND-
ENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, in which the following
per curiam was filed:

"In this case there are twelve reasons presented to the court for setting aside the order made by the board of public utility commissioners. They are, however, argued under four points in prosecutor's brief. The first and fourth points argued are, the statute upon which the order under review is based is invalid and unconstitutional because it takes the private property of the prosecutor for public use without any compensation, denies the prosecutor the equal protection of the law; impairs the obligation of contracts, &c. All these points are disposed of in the opinion of the court in *Erie Railroad Co. v. Board of Public Utility Commissioners*.

"The second point argued is, the statute is unconstitutional, in so far as it deprives the Court of Chancery of its exclusive jurisdiction over the regulation of the use of easements. This point is disposed of in the opinion of the court in the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*.

"The third point argued is, the order is invalid and beyond the jurisdiction of the board, in so far as it requires the prosecutor to change the location of its water pipes, water mains, &c., arguing that the title of the statute does not truly express

90 N. J. L. Pub. Ser. Ry. Co. v. Public Utility Board.

the object of the legislation which it embodies. This and the other points under this head are disposed of also in the opinion of the court in the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*.

"The order under review will be affirmed, with costs."

For the appellant, *Humphreys & Sumner*.

For the respondents, *L. Edward Herrmann* and *Frank H. Sommer*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

PUBLIC SERVICE RAILWAY COMPANY, APPELLANT, v.
BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL.,
RESPONDENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 24.

For the appellant, *Frank Bergen*.

For the respondents, *L. Edward Herrmann*.

Raab v. Ellison.

90 N. J. L.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

HERMAN RAAB, RESPONDENT, v. W. P. ELLISON, INCORPORATED, ETC., APPELLANT.

Argued March 16, 1917—Decided March 16, 1917.

On appeal from the Supreme Court, whose opinion is reported in 89 N. J. L. 416.

For the respondent, *George D. Hendrickson*.

For the appellant, *Davis & Hastings*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

90 N. J. L. Riverside Turn Verein Harmonie v. Paterson.

THE RIVERSIDE TURN VEREIN HARMONIE, A CORPORATION, APPELLANT, v. THE MAYOR AND ALDERMEN OF THE CITY OF PATERSON ET AL., RESPONDENTS.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Ward & McGinnis*.

For the respondents, *Edward F. Merrey*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons given in the *per curiam* in *Wilhelmina Koettegen v. Mayor and Aldermen of the City of Paterson et al.*, No. 149 of the present term of this court.

For affirmance—THE CHANCELLOR, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

HARRY ROSE, RESPONDENT, v. BENJAMIN G. FITZGERALD, APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“This was a suit against a husband to collect the amount of a bill for tailoring done for the wife. There was a judg-

Rose v. Fitzgerald.

90 N. J. L.

ment for the plaintiff below. The defence was mainly based upon the claim that the plaintiff had been notified by the husband not to give any credit to the wife, and also that the articles furnished were not necessities. After the suit was begun the wife paid a part of the bill, leaving a balance of forty-five (\$45) dollars, which was the basis of the judgment.

"Appellant has put in what appears to be a stenographic transcript of the testimony taken in the court below, but there is nothing in the record to show that a stenographer was appointed pursuant to the statute, and unless there was an appointment, the transcript has no value. On the other hand, there is a state of the case settled by the trial judge, which naturally excludes a stenographic transcript. The alleged errors called to our attention are the following:

"First. That the court found, against uncontradicted evidence, that the plaintiff did not see a written notice upon the defendant's check that no more credit was to be given to the wife. The burden was on the defendant to show that the plaintiff did see this notice, and the judge certifies that the plaintiff testified that if the clause was there he did not see it, while the transcript is silent on this point. We think we should not take the silence of the unofficial transcript as impeaching the statement of the court to the contrary.

"The same may be said as to the court's finding that the defendant did not supply his wife with necessities. The ruling that evidence as to what were necessities was part of the defence is complained of in the brief, but was not objected to at the trial and was not specified as a ground of error.

"Third and fourth. It is objected, generally, that the defendant did not have a fair trial. A general objection of this character, of course, counts for nothing.

"We find no error of the trial court properly assigned that should lead to a reversal, and the judgment will, therefore, be affirmed."

For the appellant, *John J. Crandall* and *James A. Lightfoot*.

For the respondent, *Morris Bloom*.

90 N. J. L.Smith v. Fire Com'rs of Newark.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

CORNELIUS SMITH, APPELLANT, v. BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, RESPONDENT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Frank E. Bradner*.

For the respondents, *Harry Kalisch*.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court, *eo nomine Durkin v. Fire Commissioners of Newark*, 89 N. J. L. 468.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, PARKER, BERGEN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

Sprotte v. D., L. & W. R. R. Co.90 N. J. L.

GEORGE SPROTTE, RESPONDENT, v. THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY,
APPELLANT.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which court the following *per curiam* was filed:

"The plaintiff employed a shipping company in Los Angeles to ship a carload of furniture from that point to Dover, New Jersey. When the goods arrived in New York they were forwarded by the shipping company to Dover over the defendant's line, and some of the goods were damaged when they arrived.

"The defendant issued a way bill in which it was stated that the property was in apparent good order except as noted. (Contents and condition of packages unknown.) The list contained specific items, some of which were boxes. There was a stipulation that if defendant was found liable the damages were to be assessed at \$169.05, and this sum the District Court found. Under the record all we have to deal with is the liability of the defendant between New York and Dover. The defendant claims that the court should have granted its motion for a nonsuit, or directed a verdict for the defendant because there was no proof that the goods were damaged while in defendant's possession, beyond that the way bill certified that they were received in apparent good order in New York, and the fact that they were received in a damaged condition at Dover.

"Such a recital in a bill of lading is *prima facie* evidence of the fact that the goods were in apparently good condition when received, and while the common carrier may show the contrary the burden is on it. No attempt was made in this case to show that the goods were not in good condition when delivered to the defendant, and where a carrier receives freight in good condition, and it is found in its possession damaged

90 N. J. L.

Sprotte v. D. L. & W. R. R. Co.

at point of destination, negligence will be presumed, unless removed by explanation.

"The next point is, that it was error to admit the contract with the Los Angeles Moving Company, the initial shipping company. This did not injure the defendant if error was harmless.

"The next objection is refusal to allow defendant's train conductor to testify that nothing unusual happened to the car between New York and Dover. This was immaterial, for if he so testified, which is the best defendant could expect, it would prove nothing, for the goods were in a closed car and it was not pretended that anything happened to the car.

"As we find no error in this record the judgment will be affirmed, with costs."

For the appellant, *Frederic B. Scott*.

For the respondent, *King & Vogt*.

PER CURIAM.

The facts are stated in the memorandum of the Supreme Court. We agree that the bill of lading was sufficient *prima facie* proof that the goods mentioned therein were in apparent good order, so far as their good order could be apparent. This applies to the greater part of the goods and of the damages claimed. Most of the goods were of such a character that it could be ascertained by mere inspection whether they were in sound condition, and most of the damages were due to breakage. To such goods where the claim is for obvious injury the clause "contents and condition of packages unknown" is not applicable. Where the claim for scratches and similar injuries to furniture and the condition at the time the bill of lading was issued was concealed by burlap or other covering, there could not be good order apparent in that respect and proof other than the mere acknowledgment in the bill of lading would be necessary. This difficulty is particularly applicable in this case to the piano, which was boxed. We should have difficulty with the case if the distinction had

State v. Fletcher.

90 N. J. L.

been made at the trial and the question properly raised. This was not done. The plaintiff relied on the bill of lading, as if its terms were applicable alike to all the articles named. The defendant relied on the clause as to contents and condition of contents of packages, as if all the articles had been so packed as to conceal their real nature. The amount of damages was stipulated. The error was the usual one of attempting to apply general expressions without discrimination to particular cases. We have nothing to add to what the Supreme Court said as to the rulings on questions of evidence. We find no error of law pointed out in the record and the judgment must be affirmed, with costs.

For affirmance—THE CHANCELLOR, SWAYZE, TRENCHARD, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR, v.
JANE FLETCHER, PLAINTIFF IN ERROR.

Submitted March 26, 1917—Decided June 18, 1917.

On appeal from the Supreme Court, in which the following *per curiam* was filed:

“We think it was proper to allow Dr. Ill to use his hospital history to refresh his recollection. Although it was dictated by him to another and not transcribed in his presence, he identified it as a transcription of the notes he dictated at the time. We think he might well do so; and no more proof was necessary to justify its use.

“The evidence warranted the statement of the prosecutor that Dr. Ballentine became convinced that a criminal opera-

90 N. J. L.State v. Fletcher.

tion had been performed. The statement that the doctor made an examination perhaps was inaccurate, dependent on the sense in which the word 'examination' was used; but it was harmless.

"The cross-examination of the defendant as to her acquaintance with Dr. Muttart was permissible. She testified on direct examination that her patient told her she had come from a doctor in New York. On cross-examination she said the girl gave her the name of Dr. Muttart. Her knowledge of the doctor might throw light on the probability that she would perform an abortion on a girl who claimed to have been sent by Dr. Muttart.

"It was permissible to use the speculum offered in evidence to illustrate the kind of an instrument which the girl said the defendant had used.

"The defendant was not injured by the charge that 'the fact that this young woman had a previous miscarriage or visited someone else is not finally to affect your minds in determining this defendant's guilt. If she had ninety-nine other operations, and somebody else had gone free, that is not the question.' We infer that the judge was trying to warn the jury not to convict the defendant because they thought someone ought to be punished. It seems to be intended as a warning in favor of the defendant.

"We think it was permissible to ask the defendant if she couldn't give the girl something to alleviate the pain. The defendant had testified that the girl had come to her suffering pains of pregnancy and wanting her to perform an abortion; that she had refused to do so, and offered to do nothing to alleviate the pain. The questions bore upon the probability of defendant's testimony, since the prosecutor might well argue that the natural instinct of humanity would lead the defendant to alleviate the pains if she was unwilling to perform the abortion.

"Part of the prosecutor's examination of the complaining witness was leading, but we cannot say there was any legal error or abuse of discretion.

"The judgment must be affirmed."

State v. Stanford.90 N. J. L.

For the plaintiff in error, *Hamill & Cain*.

For the defendant in error, *Robert S. Hudspeth*, prosecutor of the pleas.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, PARKER, MINTURN, KALISCH, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. ALBERT STANFORD, PLAINTIFF IN ERROR.

Argued March 6, 1917—Decided March 6, 1917.

On appeal from the Supreme Court.

For the plaintiff in error, *Garrison & Voorhees and Isaac H. Nutter*.

For the defendant in error, *Charles S. Moore*.

PER CURIAM.

Albert Stanford and Albert Jackson were convicted at the January term, 1916, of the Atlantic County Court of Quarter Sessions, each under two separate indictments for the common law crime of keeping disorderly houses at two separate places in Atlantic City. The four indictments were tried together, verdicts of guilty found, and from separate judgments in each case writs of error were taken to the Supreme Court. The

90 N. J. L.State v. Stanford.

cases were there argued together and the convictions affirmed by that court. From the judgments of affirmance entered in the Supreme Court Albert Stanford took two writs of error which are now before this court. The testimony and assignments being identical, the cases were presented and argued together by consent of counsel.

The opinion in the four cases in the Supreme Court was rendered in one of the Jackson cases, and is as follows:

“Per curiam: The defendant was indicted for, and convicted of, the crime of keeping a disorderly house, the gravamen of the charge being the assisting in carrying on a gambling establishment at Chalfonte avenue, in the city of Atlantic City. A similar indictment was found against one Albert Stanford, and a conviction was had in his case also. The cases were tried together in the Quarter Sessions and were argued together before this court.

“Numerous errors were assigned by each defendant, but all of them were abandoned on the argument except three. These three are each of them directed at an alleged error of the trial court in permitting the official stenographer to read the entire testimony given by Stanford, and also that given by Jackson, on a trial theretofore had on an indictment presented against one Andrew Terry, who was the proprietor of the gambling establishment at which the present defendants acted as assistants. The pith of the contention is that the prior testimony given by each of them, and permitted to be read to the jury, was evidential only against himself, and not against his co-defendant, and that its admission was improper for this reason. It is conceded that Jackson's previous testimony, if voluntarily given, was properly admitted as evidential against himself, and that Stanford's also was admissible against himself. It follows, therefore, that an application to exclude this evidence *in toto* was properly refused. The protection which each defendant was entitled to have against the previous testimony of his co-defendant, was an instruction that it should not be considered by the jury in passing upon his guilt or innocence. *Perry v. Levy*, 87 N. J. L. 670. But as no re-

State v. Stanford.90 N. J. L.

quest for such an instruction was proffered, and, as the testimony was admissible to the extent indicated, the defendants cannot now complain of the failure of the trial court to thus limit the effect of the evidence. Moreover, the objection to the admission of this testimony was not based upon its lack of evidential value, but upon the sole ground that it could not be introduced until it was first shown that the admissions contained in it were voluntary, and that the party making them was cautioned that what he said might be used against him on some other occasion; and further, that the state had no right to make a defendant testify against himself. These grounds of objection were, under the circumstances, entirely without merit and have not been urged before us. It is proper to say, however, that the previous testimony of these defendants on the trial of the Terry indictment had been elicited, not by the state, but by Terry's counsel; and, under these conditions, there was, of course, no obligation on the part of the prosecutor of the pleas to warn the witnesses that what they might say could be used against them if it indicated criminality on their part. The suggestion that the state, by submitting the previous admissions of the defendants, was compelling them to testify against themselves, is, of course, entirely without substance.

"The judgment under review will be affirmed."

The other judgments were affirmed, for the reasons given in the above opinion, a memorandum to that effect being filed.

PER CURIAM.

The two judgments under review on the writs of error sued out by Stanford in this court are affirmed, for the reasons given in the above opinion of the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, PARKER, BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 12.

For reversal—None.

90 N. J. L.State v. Vreeland.

STATE OF NEW JERSEY, DEFENDANT IN ERROR, v. HARRY
A. VREELAND, PLAINTIFF IN ERROR.

Argued March 22, 1917—Decided June 18, 1917.

On error to the Supreme Court, whose opinion is reported
in 89 N. J. L. 423.

For the defendant in error, *Martin P. Devlin*.

For the plaintiff in error, *John A. Hartpence*.

PER CURIAM.

The judgment under review herein should be affirmed, for
the reasons expressed in the opinion delivered by Mr. Justice
Trenchard in the Supreme Court.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE,
BERGEN, MINTURN, KALISCH, WHITE, HEPPENHEIMER, WIL-
LIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

SUBURBAN INVESTMENT COMPANY, APPELLANT, v. STATE
BOARD OF ASSESSORS ET AL., RESPONDENTS.

Argued March 7, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Franklin W. Fort*.

For the respondents, *Herbert Boggs*, assistant attorney-
general.

Suburban Invest. Co. v. State Bd. Assessors. 90 N. J. L.

PER CURIAM.

The judgment is affirmed, for the reasons stated in the following memorandum of the Supreme Court:

The Suburban Water Company was incorporated under the laws of this state in 1912, and, subsequently, changed its name to the Suburban Investment Company, the prosecutor in this case. The facts are fully set out in the *per curiam* opinion in New Jersey Water Company against the same defendant, decided at the present term. The prosecutor was assessed \$560.80 for state uses on \$560,800 amount of capital stock issued and outstanding January 1st, 1914, as reported by the prosecutor.

The only specific reason assigned by the prosecutor for setting aside the assessment is that the state board of assessors made and levied the tax upon the prosecutor under the provision of chapter 185 of the laws of 1896, and the supplements thereto and amendments thereof, instead of under the act of 1900, discussed in the *per curiam* opinion above referred to.

The return made by the prosecutor to the state board of assessors sets forth the amount of its capital stock issued and outstanding on January 1st, 1914, under section 3 of the Corporation Franchise act of April 18th, 1884, as said section was amended in 1906 (*Pamph. L.*, p. 31), as above stated.

The prosecutor's return reports that its business is, "investment in and managing corporations," and that it is not engaged in manufacturing or mining within this state. The situation of the prosecutor on December 31st, 1913, was that of an inactive corporation holding no special franchise. In harmony with the views expressed in the *per curiam* opinion filed in No. 225, the tax was properly assessed in the present case.

The writ will be dismissed and the action of the state board of assessors affirmed, with costs.

For affirmance—THE CHANCELLOR, GARRISON, SWAYZE, TRENCHARD, BERGEN, BLACK, WHITE, WILLIAMS, TAYLOR, GARDNER, J.J. 10.

For reversal—None.

90 N. J. L. W. Union Tel. Co. v. Public Utility Board.

WESTERN UNION TELEGRAPH COMPANY, APPELLANT, v.
BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL.,
RESPONDENTS.

Argued January 4, 1917—Decided October 11, 1917.

On appeal from the Supreme Court, in which the following
per curiam was filed:

"In this case there are eleven reasons presented to the court for setting aside the order made by the board of public utility commissioners. They are in the main identical with the reasons presented by the prosecutor, the Passaic Water Company, except an additional reason, viz., the order is invalid, because it imposes a burden upon the interstate traffic of the prosecutor, interferes with and impairs its ability to perform its duty as a common carrier of such traffic.

"They are, however, argued under five points in prosecutor's brief. The first four points are constitutional questions, all of which are disposed of in the opinion of the court in the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*.

"The fifth point is, the order is invalid, stating six reasons; these, also, have been disposed of in the opinion of the court in the case of *Erie Railroad Co. v. Board of Public Utility Commissioners*. They need no further discussion.

"The order under review will be affirmed, with costs."

For the appellant, *Collins & Corbin*.

For the respondents, *L. Edward Herrmann* and *Frank H. Sommer*.

PER CURIAM.

The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

W. Jersey Trust Co. v. Phila. & Read. Ry. Co. 90 N. J. L.

For affirmance—THE CHANCELLOR, MINTURN, KALISCH, WHITE, WILLIAMS, TAYLOR, GARDNER, JJ. 7.

For reversal—THE CHIEF JUSTICE, SWAYZE, PARKER, BERGEN, HEPPENHEIMER, JJ. 5.

WEST JERSEY TRUST COMPANY, RESPONDENT, v. PHILADELPHIA AND READING RAILWAY COMPANY, APPELLANT.

Argued March 20, 1916—Decided July 18, 1917.

On appeal from the Supreme Court.

For the appellant, *Edward L. Katzenbach*.

For the respondent, *Ott & Carr*.

PER CURIAM.

The judgment under review herein should be reversed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the case of *George A. Rounsaville v. Central Railroad Company of New Jersey*, No. 81 of the November term, 1915, recently decided in this court upon the authority of the decision of the Supreme Court of the United States in the case of *Erie Railroad Co. v. Amy L. Winfield* (opinion by Mr. Justice Van Devanter), 244 U. S. 170.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SWAYZE, TRENCHARD, BERGEN, WHITE, HEPPENHEIMER, WILLIAMS, GARDNER, JJ. 9.

90 N. J. L.Zabriskie v. Edwards.

CHARLES L. ZABRISKIE ET AL., EXECUTORS OF THE
LAST WILL AND TESTAMENT OF CHARLES FRED-
ERIC ZABRISKIE, DECEASED, APPELLANTS, v. ED-
WARD I. EDWARDS, COMPTROLLER OF THE TREAS-
URY OF THE STATE OF NEW JERSEY, RESPONDENT.

Argued March 13, 1917—Decided June 18, 1917.

On appeal from the Supreme Court.

For the appellants, *Lum, Tamblin & Colyer*.

For the respondent, *John W. Wescott*, attorney-general.

PER CURIAM.

The judgment under review herein should be affirmed, for the reasons expressed in the *per curiam* of this court in Maxwell et al., Executors, &c., v. Edwards, Comptroller, &c., et al., No. 108 of the present term of this court.

For affirmance—THE CHANCELLOR, GARRISON, TRENCHARD, BERGEN, MINTURN, BLACK, WHITE, HEPPENHEIMER, WILLIAMS, TAYLOR, GARDNER, JJ. 11.

For reversal—None.

INDEX.

ABORTION.

1. Where the proofs show that the defendant merely aided and abetted an abortion, without actually participating in the use of the instruments for effecting it, he may be convicted upon an indictment charging him with being a principal in the production of an abortion, all concerned in such a misdemeanor being liable as principals. *State v. Riccio*, 25
2. In a prosecution for violation of section 119 of the Crimes act by procuring the "miscarriage of a woman pregnant with child," it is not necessary to show that the woman was quick with child but it is sufficient if it appears that conception had taken place and gestation was in progress. *State v. Loomis*, 216
3. Where in a trial for abortion, in which the state claimed that the *fœtus* had been expelled by the female, the state introduces direct evidence of the sexual intercourse with defendant on more than one occasion, of the subsequent cessation of menses, and of nervous functional disturbances, which, in the opinion of experts denoted probable pregnancy, there was sufficient proof to justify the jury in finding that pregnancy existed. *Ib.*

ACTIONS.

See RAILROADS, 5.

ADMISSIONS.

See EVIDENCE, 2.

ADVERTISING.

1. The publishing of official advertisements for municipal corporations in newspapers is neither work, labor nor materials furnished by the owners of the papers to such advertising customers under *Pamph. L.* 1912, p. 593. *Delker v. Freeholders of Atlantic*, 473
2. The act of 1909 (*Pamph. L.*, p. 92; *Comp. Stat.*, p. 3762), which regulates the price to be paid for public advertising, is not repealed by implication by act of 1912 (*Pamph. L.*, p. 593) (there being no express repealer, specific or general), which latter act relates to expenditures by public bodies for the doing of work or the furnishing of materials or labor. *Ib.*
3. Although a municipal corporation advertises for bids or proposals for publishing all official advertising in newspapers, it is not required to award a contract to the lowest bidder, but may contract for such advertising at the price fixed in *Pamph. L.* 1909, p. 92. *Ib.*

ANIMALS.

1. The infant plaintiff, a boy sixteen years old, testified that he had been in the business of delivering newspapers on defendant's estate to him and his tenants, for about a year, and that on the day he was bitten by defendant's dog he was going across defendant's lawn on the regular route he had always taken, having entered through a gate which was open. *Held*, that even if he were a trespasser

*Appeal and Error.**Attachment.*

- on defendant's premises he was entitled to recover damages for the injury resulting from the biting by the dog, under the facts in this case, if it were owned by the defendant (which was admitted), and if defendant knew that the dog had previously bitten other people, of which there was evidence, and unless the plaintiff was guilty of contributory negligence, aside from the mere fact of trespassing, and he was not, according to his own testimony. *Eberling v. Mutillod*, 478
2. The mere fact of trespassing upon the grounds of another is not, in and of itself, contributory negligence which will defeat an action to recover damages for injuries inflicted by a vicious animal belonging to defendant and allowed to be at large upon the premises. *Ib.*
 3. The question whether a person entering upon the grounds of another without invitation or license, and then and there injured by an attack by a vicious animal of the owner allowed to be at large upon the premises, exercises the degree of care which reasonable and prudent persons would use under like circumstances, is a jury question. *Ib.*
- APPEAL AND ERROR.**
1. A court of appeals need not, but may, decide questions on a record before it which were not raised in a court below; and it is the constant practice of appellate courts to notice and decide on questions of jurisdiction and public policy, without those questions having been raised below. *McMichael v. Horay*, 142
 2. A court of appeals may affirm a judgment, on ground other than that upon which the decision was rested in the court below, if the decision be correct. *Ib.*
 3. A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal. *Shaw v. Bender*, 147
 4. On an appeal corresponding to writ of error at common law, every intendment is in favor of the correctness of the judgment below, and doubt will not lead to a reversal. *Phillips v. Longport*, 212
 5. On appeal corresponding to a writ of error, the appellate court cannot properly deal with any other state of the case except that considered by the court below. *Ib.*
 6. It is the judgment, not the opinion, of a court below which is brought before an appellate court for review. If the judgment of the lower court varies from its decision, it may be corrected only by amendment in that court; in the court above it can only be affirmed, reversed or modified. *Delker v. Freeholders of Atlantic*, 473
 7. Writs of error do not run directly to this court from the order of a justice of the Supreme Court reviewing the summary convictions of criminal courts in municipalities. *Jersey City v. Thorpe*, 520
 8. The Supreme Court cannot review the findings of fact of the District Courts, when supported by evidence. *Duff v. Prudential Insurance Co.*, 646

ATTACHMENT.

1. The respondents caused an attachment to be issued out of a court for the trial of small causes and under it the debtor's goods were seized; subsequently, but before judgment in the proceedings, the prosecutors, as they

Beneficial Associations.

claim, issued an attachment out of the Circuit Court against the same debtor and under it the same goods were seized. *Held*, that if it appeared that prosecutor had in fact issued the attachment and seized the goods it had the same right that the debtor would have to move the justice court to quash the writ issued by that court, and to rescue the goods, on which it had a lien, from the prior seizure. *Lampert Bros. v. French & Son*, 600

2. In support of such motion *ex parte* affidavits are not sufficient; the material facts must be proved before the justice, by the production of competent proof. *Ib.*

3. A stipulation of facts not submitted to the justice of the peace cannot be used on review by an appellate court. *Ib.*

ATTORNEY AND CLIENT.

See PRIVILEGED COMMUNICATIONS, 1, 2.

BENEFICIAL ASSOCIATIONS.

1. Where the constitution and by-laws of a beneficial order permit a member at his option to change the character of his membership by surrendering a certificate assuring the payment of a fixed sum at death, and have another certificate issued in its stead fixing a less sum to be paid, in consideration of a reduction of the amount of the dues payable for the assurance, if he shall comply with certain conditions set out in the constitution and by-laws which are made a part of the contract of assurance, the procedure and conditions required by the contract to accomplish such change must be complied with and the

Boroughs.

new certificate issued before an action at law can be maintained to recover what would be due if the change had been made, a new certificate issued, and its terms performed by the assured. *McGuire v. Catholic Benevolent Legion*, 224

2. If a proper application for a new certificate be refused by the subordinate council and the rules of the order provide for an appeal from such refusal to the supreme council, that remedy must be exhausted by the applicant before a right of action arises for damages caused by the refusal of the subordinate council to grant the application. *Ib.*

BILLS OF EXCEPTIONS.

See CRIMINAL PROCEDURE, 2, 3.

BILLS OF LADING.

See CARRIERS, 1, 2, 3, 4, 5.

BOROUGHS.

1. An appointment to the office of any borough, to fill a vacancy in such office, caused by death, disability, resignation or any other cause, if made for a longer term than until noon of the first day of January following the next annual election, is in violation of section 1 of the amendment of 1904 of the Borough act (*Comp. Stat.*, p. 230), and therefore nugatory. *Florey v. Lanning*, 12
2. Under the General Borough act an assessment for the cost of sidewalks is to be made by resolution of the common council, on the lands fronting on the street along which the sidewalks are laid, and not by commissioners of assessment appointed to determine the damages and benefits

Bridges.

arising from the improvement of public streets. *Belmont Land Association v. Garfield*, 394

3. Commissioners of assessment in considering the benefits to be assessed against the landowner, for the grading and improvement of a public street in a borough, are required to consider and report the damages which a landowner may suffer because of the improvement as well as benefits which may accrue therefrom.

Ib.

4. Every ordinance for making street improvements must be preceded by the petition required under section 53 of the Borough act. *Comp. Stat.*, p. 260. *Ib.*

See also TAXES AND ASSESSMENTS, 13.

BRIDGES.

The plaintiff having fallen from a county bridge by reason of the giving away of an iron rail, and there being testimony from which the jury might infer negligence of the defendant, in the performance of its statutory duty of maintenance and repair, as well as the question of the defendant's ownership of the rail, and of the *locus in quo*; and also testimony from which an inference might reasonably be drawn, that the defendant assumed responsibility and exercised control over the rail in question—*Held*, that a motion to nonsuit, as well as a motion to direct a verdict were properly refused. *Darrille v. Freeholders of Essex*, 617

BROKERS.

1. A broker who procures a loan of money for his principal under the express contract of the latter to pay him a greater compensation than that allowed by section 5 of the Usury act, may,

Building and Loan Associations.

notwithstanding such void contract, recover the reasonable value of his services, not exceeding the statutory rate. *Roth & Miller v. Temkin*, 39

2. In a suit by a broker for commissions, alleged to be due for the procuring of a sale of real estate under a written agreement, where it was a disputed question whether the agreement had been abandoned by consent, such a question was a proper one for the jury. *Freeman v. Van Wagenen*, 353

3. In the absence of a special agreement, a real estate broker, acting by virtue of a written agreement, earns his commission when he secures a ready and willing purchaser, brings the parties together and gets them to make a binding agreement. *Ib.*

BUILDING AND LOAN ASSOCIATIONS.

Where a building and loan association draws a check to pay matured shares on account of which a loan has been made and a note taken, expecting the shareholder to pay the note at the time of delivery of the check for the shares, and both note and check are placed in a safe to which the secretary of the association has lawful access, he being the principal officer transacting the financial business between the association and its shareholders, and authorized to receive all moneys paid to the association, and he, without express authority, takes the note and check from the safe, delivers the check to the shareholder, collects the money due on the note, surrenders it and embezzles the money, the loss must, as between two innocent parties fall on the one whose negligence made the fraud possible. Whether the circumstances in

Carriers.

such a case amount to negligence is a jury question, and a directed verdict is error. *Parkview B. & L. Ass'n of Newark v. Rose*, 614

CARRIERS.

1. *Prima facie*, the consignor of freight who contracts with the carrier for its shipment, is liable to pay the charges of transportation, and the mere fact that the charges are left unpaid by the consignor and are to be collected from the consignee at destination, does not discharge the consignor from liability to the carrier. *Penna. R. R. Co. v. Townsend*, 75
2. The term "consignee" when used in a bill of lading means the person named in the bill as the person to whom delivery of the goods is to be made. *Ib.*
3. The mere existence of the relation of carrier and consignee is not enough to establish a liability of the latter to pay freight charges. There must be an agreement by the consignee, express or implied, in order to create such a liability. *Ib.*
4. If the assignee of a bill of lading accepts and removes goods at their destination without paying the charges, with knowledge that the carrier is giving up for his benefit a lien thereon for a stated amount, that would be cogent evidence from which to imply an agreement on his part to pay the known amount of the freight charges. *Ib.*
5. The mere acceptance and removal of goods at their destination by the assignee of a bill of lading, and the payment by him of the freight bill as made out by the carrier, without knowledge by the assignee that the same was an undercharge, does not create any further liability.

Carriers.

on the part of such assignee, even though, by mistake of the carrier, the bill as rendered did not include the entire charge. *Ib.*

6. A carrier owes to its passenger the duty of protecting him from the violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care, and it will be held responsible for its servant's negligence in this particular when, by the exercise of proper care, the act of violence might have been foreseen and prevented. *Hoff v. Pub. Serv. Ry. Co.*, 386
7. The failure of the servant of a carrier to prevent the commission of an assault upon a passenger by another passenger, to be a negligent failure or omission must be a failure or omission to do something which could have been done by the servant; and, therefore, there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command. *Ib.*
8. The fact that a passenger was intoxicated to the knowledge of the carrier's conductor, the fact that he had repeatedly insulted a woman passenger in the presence and hearing of the conductor, and immediately after the last insulting remark arose from his seat and struck her twice, all without any word of admonition or protest by the conductor or attempt upon his part to prevent the assault, although he was throughout within arms' reach of the drunken man, are circumstances from which the jury could properly infer that with proper care upon the

Cases Affirmed.

part of the conductor the act of violence might have been foreseen and prevented. *Ib.*

CASES AFFIRMED.

1. Consolidated Gas and Gasoline Engine Company v. Michael Blanda. From the Supreme Court. 89 N. J. L. 104, 135
2. Desire Fortein et al. v. The Delaware, Lackawanna and Western Railroad Company. From the Hudson County Circuit Court, 137
3. Thomas McMichael v. Harry Horay et al. From the Supreme Court, 142
4. Mary Shaw v. Ella A. Bender. From the Atlantic County Circuit Court, 147
5. Edua Dickinson v. The Delaware, Lackawanna and Western Railroad Company. From the Supreme Court, 158
6. Mausoleum Builders of New Jersey v. The State Board of Taxes and Assessments et al. From the Supreme Court. 88 N. J. L. 592, 163
7. Peoples Bank and Trust Company v. Passaic County Board of Taxation. From the Supreme Court, 171
8. Maryan Wilczynski, Administratrix, &c., v. The Pennsylvania Railroad Company. From the Supreme Court, 178
9. Philip D. Heinz v. The Delaware, Lackawanna and Western Railroad Company. From the Supreme Court, 198
10. Maxime Bouquet v. The Hackensack Water Company. From the Supreme Court, 203
11. Theodore Jerolaman v. The Town of Belleville. From the Essex County Circuit Court, 206
12. Gustave Kratz v. The Delaware, Lackawanna and Western Railroad Company. From the Morris County Circuit Court, 210
13. Arvine H. Phillips et al. v. The Borough of Longport. From the Supreme Court, 212
14. The State of New Jersey v. Bruce E. Loomis and Frank G. Blinn. From the Supreme Court. 89 N. J. L. 8, 216
15. John Eisele and Nathaniel King, partners trading as Eisele & King, v. Elias Raphael. From the Supreme Court, 219
16. Catherine McGuire, Administratrix, v. Catholic Benevolent Legion. From the Supreme Court, 224
17. Stephen Nevich v. The Delaware, Lackawanna and Western Railroad Company. On appeal of The Delaware, Lackawanna and Western Railroad Company. From the Supreme Court, 228
18. John C. Reed v. Atlantic City and Suburban Gas and Fuel Company. From the Supreme Court, 231
19. George W. Shoemaker v. Phillipsburg Horse Car Railroad Company. From the Warren County Circuit Court, 235
20. Edward W. Martin v. Alfred F. Baldwin. From the Supreme Court, 241
21. James A. Whitcomb v. R. Russell Brant. From the Essex County Circuit Court, 245
22. Nicola Caruso and Giuseppe Caruso v. Town of Montclair. From the Supreme Court, 255

Cases Affirmed.

<i>Cases Affirmed.</i>	<i>Cases Affirmed.</i>
23. Samuel Martin <i>v.</i> Lehigh Valley Railroad Company. From the Supreme Court, 258	36. Stratton Chrisafides <i>v.</i> Brunswick Motor Company and John Knauss. From the Supreme Court, 313
24. The State of New Jersey <i>v.</i> Frederick Hart. From the Supreme Court. 88 N. J. L. 48, 261	37. Joseph Colletto <i>v.</i> Hudson and Manhattan Railroad Company. From the Supreme Court, 315
25. Eugene Frank <i>v.</i> Board of Education of Jersey City. From the Supreme Court, 273	38. Jesse V. De Groff <i>v.</i> John R. O'Connor. From the Supreme Court, 317
26. Thomas W. Jackson <i>v.</i> Lorenzo C. Dilks. From the Supreme Court, 280	39. James Devlin et al. <i>v.</i> The Mayor, &c., of Jersey City et al. From the Supreme Court, 318
27. Walter H. Smith <i>v.</i> Clarence C. Smith, Executor. From the Warren County Circuit Court, 282	40. Ralph D. Earle, Jr., <i>v.</i> Henry W. Durham. From the Supreme Court. 89 N. J. L. 4, 319
28. Grace W. Erwin, Administratrix <i>v.</i> William A. Traud. From the Supreme Court, 289	41. Daniel H. Gilbert <i>v.</i> The Pennsylvania Railroad Company. From the Supreme Court, 321
29. Charles Albrecht <i>v.</i> The Pennsylvania Railroad Company. From the Hudson County Circuit Court, 293	42. Adam Heckman <i>v.</i> Abraham Cohen. From the Supreme Court, 322
30. American Woolen Company <i>v.</i> Edward I. Edwards, Comptroller, et al. From the Supreme Court. 90 N. J. L. 69, 293	43. William C. Hendee, Administrator, <i>v.</i> Wildwood and Delaware Bay Short Line Railroad Company. From the Supreme Court. 89 N. J. L. 32, 325
31. Robert Carson <i>v.</i> Thomas J. Scully et al. From the Supreme Court. 89 N. J. L. 458, 295	44. Kells Mill and Lumber Company <i>v.</i> The Pennsylvania Railroad Company. From the Supreme Court. 89 N. J. L. 490, 325
32. Robert Carson <i>v.</i> Thomas J. Scully et al. From the Supreme Court. 89 N. J. L. 458, 295	45. J. C. Leib, a corporation, <i>v.</i> The Pennsylvania Railroad Company. From the Supreme Court, 326
33. Robert Carson <i>v.</i> Thomas J. Scully et al. From the Supreme Court. 89 N. J. L. 458, 295	46. Isaac Loewenthal <i>v.</i> The Pennsylvania Railroad Company. From the Supreme Court, 327
34. Sarah Carton <i>v.</i> Trenton and Mercer County Traction Corporation. From the Supreme Court, 311	47. James D. Moriarity <i>v.</i> Board of Commissioners of the City of Orange. From the Supreme Court. 89 N. J. L. 385, 328
35. Luigi Caruso and Carmela Caruso <i>v.</i> Town of Montclair. From the Supreme Court, 312	48. Olivit Brothers <i>v.</i> The Pennsylvania Railroad Company. From the Supreme Court, 328

<i>Cases Affirmed.</i>	<i>Cases Affirmed.</i>
49. Olivit Brothers v. The Pennsylvania Railroad Company. From the Supreme Court, 329	62. State of New Jersey v. Joseph Serritella. From the Supreme Court. 89 N. J. L. 127, 343
50. Olivit Brothers v. The Pennsylvania Railroad Company. From the Supreme Court, 330	63. Elizabeth Whittingham v. Township of Millburn et al. From the Supreme Court, 344
51. Opportunity Sales Company v. Edward I. Edwards, Comptroller, et al. From the Supreme Court, 331	64. Elizabeth Whittingham v. Township of Millburn et al. From the Supreme Court, 348
52. Peoples Bank and Trust Company v. Board of Chosen Freeholders of the County of Passaic. From the Supreme Court, 331	65. Emil Eberling v. Marius Mutillod. From the Hudson County Circuit Court, 478
53. David Rabinowitz v. Vulcan Insurance Company. From the Supreme Court, 332	66. Rudolph Eberling v. Marius Mutillod. From the Hudson County Circuit Court, 478
54. Emory R. Ruby et al. v. Freeholders of Hudson County et al. From the Supreme Court. 88 N. J. L. 481, 335	67. John Gaffney v. William H. Illingsworth. From the Essex County Circuit Court, 490
55. John T. Kennedy v. Freeholders of Hudson County et al. From the Supreme Court. 88 N. J. L. 481, 335	68. The State of New Jersey v. Matthew Jefferson. From the Supreme Court. 88 N. J. L. 447, 507
56. Joseph T. Sickler v. Tuckahoe National Bank. From the Supreme Court, 336	69. Bert Daly v. Pierre P. Garven. From the Supreme Court, 512
57. Andrew Spada et al. v. The Pennsylvania Railroad Company. From the Hudson County Circuit Court, 338	70. Carlton Godfrey et al. v. Board of Chosen Freeholders of the County of Atlantic et al. From the Supreme Court. 89 N. J. L. 511, 517
58. State of New Jersey v. Morris Hoffman. From the Supreme Court, 338	71. Augusta Armbrecht, Administratrix, &c., v. The Delaware, Lackawanna and Western Railroad Company. From the Hudson County Circuit Court, 529
59. State of New Jersey v. Lehigh Valley Railroad Company. From the Supreme Court. 89 N. J. L. 48, 340	72. The New York and New Jersey Water Company v. Charles E. Hendrickson et al. From the Supreme Court. 88 N. J. L. 595, 537
60. State of New Jersey v. Nunzio Di Maria. From the Supreme Court. 88 N. J. L. 416, 341	73. Charles R. Christy et al. v. New York Central and Hudson River Railroad Company. From the Supreme Court, 540
61. State of New Jersey v. Charles A. Nones. From the Supreme Court. 88 N. J. L. 460, 342	74. Frank G. Eckert v. Town of West Orange. From the Essex County Circuit Court, 545

<i>Cases Affirmed.</i>	<i>Cases Affirmed.</i>
75. Standard Gas Power Corporation v. New England Casualty Company. From the Supreme Court, 570	87. The Mayor and Aldermen of Jersey City v. Hudson and Manhattan Railroad Company. From the Hudson County Circuit Court, 649
76. State of New Jersey v. Mollie Monetti. From the Supreme Court, 582	88. Jerusha B. Rogers v. Susan N. Warrington. From the Supreme Court, 653
77. John C. Stuart v. Burlington County Farmers' Exchange. From the Burlington County Circuit Court, 584	89. The Peoples National Bank of Tarentum v. William E. Cramer. From the Supreme Court, 655
78. Rudolph Gross v. Commercial Casualty Insurance Company. From the Essex County Circuit Court, 594	90. Elanor Burnett and Franklin P. Burnett v. Superior Realty Company. From the Supreme Court, 660
79. Limpert Brothers, Incorporated, v. R. M. French & Son et al. From the Supreme Court, 600	91. Michael J. Cooney v. Samuel W. Rushmore et al. From the Supreme Court, 665
80. James Darville v. The Board of Chosen Freeholders of the County of Essex. From the Essex County Circuit Court, 617	92. William J. Duffy v. The Mayor and Aldermen of the City of Paterson et al. From the Supreme Court, 669
81. Ava Lightcap et al. v. Lehigh Valley Railroad Company of New Jersey. From the Warren County Circuit Court, 620	93. Michael J. Durkin v. The Board of Fire Commissioners of the City of Newark. From the Supreme Court. 89 N. J. L. 468, 670
82. Richard M. More et al., Receivers, &c., v. Charles G. Richards. From the Cumberland County Circuit Court, 626	94. Edward I. Edwards, Comptroller, v. Frederick Petry, Jr. From the Supreme Court, 670
83. Richard M. More et al., Receivers, &c., v. Simon Milner. From the Cumberland County Circuit Court, 626	95. Erie Railroad Company v. Board of Public Utility Commissioners et al. From the Supreme Court. 89 N. J. L. 57, 672
84. Richard M. More et al., Receivers, &c., v. Charles Silver. From the Cumberland County Circuit Court, 626	96. Erie Railroad Company v. Board of Public Utility Commissioners et al. From the Supreme Court. 89 N. J. L. 57, 673
85. Title Guaranty and Surety Company v. Fusco Construction Company and Donato Fusco. From the Supreme Court, 630	97. James Fagan, Jr., v. Board of Fire Commissioners of the City of Newark. From the Supreme Court, 673
86. Julius Gromer, Administrator, &c., v. Joseph George and Antonio George. From the Supreme Court, 644	98. William H. Fennan v. City of Atlantic City et al. From the Supreme Court. 88 N. J. L. 435, 674

<i>Cases Affirmed.</i>	<i>Cases Affirmed.</i>
99. William H. Fennan v. City of Atlantic City et al. From the Supreme Court. 88 N. J. L. 435, 675	111. Jacob Meyer et al. v. Board of Public Utility Commissioners et al. From the Supreme Court, 694
100. William H. Fennan v. City of Atlantic City et al. From the Supreme Court. 88 N. J. L. 435, 675	112. Fuller's Express Company v. Board of Public Utility Commissioners et al. From the Supreme Court, 694
101. William H. Fennan v. City of Atlantic City et al. From the Supreme Court. 88 N. J. L. 435, 676	113. Morris & Company v. Board of Public Utility Commissioners et al. From the Supreme Court, 694
102. William H. Fennan v. City of Atlantic City et al. From the Supreme Court. 88 N. J. L. 435, 677	114. Ferdinand H. Koenigsberger v. Kate A. Mial. From the Supreme Court, 695
103. D. Fullerton & Company v. Board of Public Utility Commissioners et al. From the Supreme Court, 677	115. Wilhelmina Koettgen v. The Mayor and Aldermen of the City of Paterson et al. From the Supreme Court, 698
104. Antonio Grandi et al. v. Nicola Brunetti. From the Supreme Court, 679	116. Charles Kruchen Company v. The Mayor and Aldermen of the City of Paterson et al. From the Supreme Court, 700
105. Salvatore Grillo et al. v. Thomas A. Edison et al. From the Supreme Court, 680	117. Long Dock Company v. State Board of Taxes and Assessments, &c. From the Supreme Court. 89 N. J. L. 108, 701
106. Giovannina Guarraia v. Metropolitan Life Insurance Company. From the Supreme Court, 682	118. Long Dock Company v. State Board of Taxes and Assessments, &c. From the Supreme Court. 89 N. J. L. 108, 702
107. Giovannina Guarraia v. Metropolitan Life Insurance Company. From the Supreme Court, 685	119. Long Dock Company v. State Board of Taxes and Assessments, &c. From the Supreme Court. 89 N. J. L. 108, 702
108. James M. Houghton et al. v. The Mayor and Aldermen of Jersey City et al. From the Supreme Court, 689	120. Long Dock Company v. State Board of Taxes and Assessments, &c. From the Supreme Court. 89 N. J. L. 108, 703
109. George Ireson v. George Cunningham. From the Cumberland County Circuit Court, 690	121. Benjamin F. Loveland v. McKeever Brothers, Incorporated. From the Supreme Court, 704
110. The Mayor and Aldermen of Jersey City v. Lewis P. Huber. From the Supreme Court, 692	122. Lawrence Maxwell et al., Executors, &c., v. Edward I. Edwards, State Comptroller. From the Supreme Court. 89 N. J. L. 446, 707

Cases Dismissed.

123. Passaic Water Company v. Board of Public Utility Commissioners et al. From the Supreme Court, 714
124. Public Service Railway Company v. Board of Public Utility Commissioners et al. From the Supreme Court. 89 N. J. L. 24, 715
125. Herman Raab v. W. P. Ellison, Incorporated. From the Supreme Court. 89 N. J. L. 416, 716
126. Riverside Turn Verein Harmonie v. The Mayor and Aldermen of the City of Paterson et al. From the Supreme Court, 717
127. Harry Rose v. Benjamin G. Fitzgerald. From the Supreme Court, 717
128. Cornelius Smith v. Board of Fire Commissioners of the City of Newark. From the Supreme Court, 719
129. George Sprotte v. The Delaware, Lackawanna and Western Railroad Company. From the Supreme Court, 720
130. The State of New Jersey v. Jane Fletcher. From the Supreme Court, 722
131. The State of New Jersey v. Albert Stanford. From the Supreme Court, 724
132. The State of New Jersey v. Harry A. Vreeland. From the Supreme Court. 89 N. J. L. 423, 727
133. Suburban Investment Company v. State Board of Assessors et al. From the Supreme Court, 727
134. Western Union Telegraph Company v. Board of Public Utility Commissioners et al. From the Supreme Court, 729

Cases Reversed.

135. Charles L. Zabriskie et al., Executors, &c., v. Edward I. Edwards, Comptroller. From the Supreme Court, 731

CASES DISMISSED.

1. Vinnie Van Hoogenstyn v. The Delaware, Lackawanna and Western Railroad Company. From an order made by the Chief Justice, 189
2. The Mayor and Aldermen of Jersey City v. Herbert A. Thorpe. From the Supreme Court, 520

CASES REVERSED.

1. Anna E. Sholes v. Leo Eisner et al. From the Supreme Court, 151
2. Max Miller v. The Mayor and Council of the City of Hoboken et al. From the Supreme Court, 167
3. George A. Rounsaville v. The Central Railroad of New Jersey. From the Supreme Court. 87 N. J. L. 371, 176
4. Ray Estate Corporation v. Andrew J. Steelman. From the Supreme Court, 184
5. Nelson Stark et al. v. Mark M. Fagan. From the Supreme Court. 89 N. J. L. 29, 187
6. Ferber Construction Company v. The Board of Education of the Borough of Hasbrouck Heights. From the Bergen County Circuit Court, 193
7. Stephen Nevich v. The Delaware, Lackawanna and Western Railroad Company. On appeal of Stephen Nevich. From the Supreme Court, 228

<i>Cases Reversed.</i>	<i>Cases Reversed.</i>
8. James E. Crossley <i>v.</i> William H. Connolly Company. From the Supreme Court. 89 <i>N. J. L.</i> 55, 238	20. Max and Abe Swiller, Partners, &c., et al. <i>v.</i> Home Insurance Company of New York. From the Supreme Court, 587
9. Oravia M. Bonfield <i>v.</i> J. Edward Blackmore. From the Supreme Court, 252	21. Andrew J. Collins <i>v.</i> Central Railroad Company of New Jersey. From the Essex County Circuit Court, 583
10. Erie Railroad Company <i>v.</i> Board of Public Utility Commissioners and Board of Chosen Freeholders of the County of Hudson. From the Supreme Court. 87 <i>N. J. L.</i> 438, 271	22. Mary F. K. Michael <i>v.</i> Harry W. Minchin. From the Essex County Circuit Court, 603
11. Thomas Delker <i>v.</i> The Board of Chosen Freeholders of the County of Atlantic et al. From the Supreme Court, 473	23. Parkview Building and Loan Association of Newark <i>v.</i> Edwin E. Rose. From the Supreme Court, 614
12. Voris Fox <i>v.</i> Forty-Four Cigar Company. From the Supreme Court, 483	24. Edwin Betts <i>v.</i> Massachusetts Bonding and Insurance Company. From the Supreme Court, 632
13. Attorney-General <i>v.</i> William P. Verdon. From the Supreme Court. 89 <i>N. J. L.</i> 16, 494	25. Peter Breidt City Brewery Company <i>v.</i> Fred Weber. From the Supreme Court, 641
14. John Ross <i>v.</i> Board of Chosen Freeholders of the County of Hudson. From the Supreme Court, 522	26. Richard H. Duff, Administrator, &c., <i>v.</i> Prudential Insurance Company of America. From the Supreme Court, 646
15. Township of Hamilton <i>v.</i> Mercer County Traction Company et al. From the Supreme Court. 88 <i>N. J. L.</i> 485, 531	27. The Estate of John Brinsko <i>v.</i> Lehigh Valley Railroad Company of New Jersey. From the Supreme Court, 658
16. Vito Orlando <i>v.</i> F. Ferguson & Son. From the Supreme Court, 553	28. O. J. Gude Company <i>v.</i> Newark Sign Company et al. From the Supreme Court, 686
17. Security Trust Company, Executor, &c., <i>v.</i> Edward I. Edwards, Comptroller. From the Supreme Court. 89 <i>N. J. L.</i> 396, 558	29. Harriet Nell et al. <i>v.</i> William C. Godstrey. From the Bergen County Circuit Court, 709
18. Bruce P. Kitchell <i>v.</i> James E. Crossley et al. From the Essex County Circuit Court, 574	30. New York, Susquehanna and Western Railroad Co. <i>v.</i> Charles J. Newbaker. From the Supreme Court, 713
19. Security Trust Company, Executor, &c., <i>v.</i> Edward I. Edwards, Comptroller. From the Supreme Court, 579	31. West Jersey Trust Company <i>v.</i> Philadelphia and Reading Railway Company. From the Supreme Court, 730

Cemeteries.

Commission Government.

CEMETERIES.

1. It is not reasonable to assume that the power conceded by the legislature to cemetery associations, for the purpose of the protection, under proper management, of the bodies of the dead, is so comprehensive in scope as to enable them to purchase tracts of land, and to hold them unimproved and undeveloped for any purpose out of the taxable assets of township, county and state assessments. *Fairview Heights Cemetery Co. v. Fay*, 427
2. Where property, held by a cemetery association, presents no *indicia* of actual use or of reasonably contemplated use, within the statutory purview, such property should not be exempted from taxation. *Ib.*

CERTIORARI.

- A prosecutor of a writ of *certiorari* is too late to be heard to complain of alleged informalities and irregularities in the procedure of the adoption of a building code ordinance twelve years after its adoption, and under which ordinance citizens of the municipality, affected thereby, have expended their means and conformed their building operations to comply with its provisions. *Ninth St. Imp. Co. v. Ocean City*, 106

CIVIL SERVICE.

Plaintiff, who held a position in the county jail under the provisions of the Civil Service law, having been dismissed by the sheriff in violation of such provisions, brought his suit for damages against the board of chosen freeholders and was denied recovery upon the doctrine of *Stuhr v. Curran*, 44 N. J. L. 181.

Held, that as the relation between plaintiff and defendant was contractual in character, it was error to apply to it a doctrine that applied only to those who were part of a governmental department, to wit, officers, and not to those employed by such department. *Held, also*, that the relation of the parties bound the defendant to the observance of the pertinent provisions of the Civil Service law, and that such implied contract was broken by the defendant when the sheriff as its agent dismissed the plaintiff in violation of such provisions. *Ross v. Freeholders of Hudson*, 522

COLLATERAL INHERITANCE TAX.

See SUCCESSION TAX.

COMMISSION GOVERNMENT.

1. The legislature did not intend by the provisions for the initiative in the Walsh act (*Pamph. L. 1911, p. 462*) to make it possible to change fundamentally the scheme of government with power concentrated in the commissioners therein provided for, and again scatter the powers among different boards. *Buohl v. Beverly*, 44
2. The act to establish an excise department (*Pamph. L. 1901, p. 239; Comp. Stat., p. 2918*) is superseded by the Walsh act (*Pamph. L. 1911, p. 462*) in cities which adopt the latter. *Ib.*
3. By the provisions of section 8 of *Pamph. L. 1911, p. 471*, commonly known as the "Walsh act," the adoption by any city of the provisions of that act results in the confirming and validating of such local legislation as the city governing body had

Condemnation.

passed and which is then in operation in the municipality. *Ninth St. Imp. Co. v. Ocean City*, 106

See also EVIDENCE, 1.
OFFICERS, 1, 2.

CONDEMNATION.

1. Valuing land taken under condemnation, underlaid with stone, the stone should not be valued separately and apart from the land, but it may be shown to what extent the land is enhanced in value by the stone. The stone is a component part of the land. *Ross v. Com'rs Palisades Interstate Park*, 461
2. It is not error to admit evidence of prices paid by the condemning party for similar lands in the vicinity. *Ib.*
3. In order that the price paid for land in the neighborhood of that being condemned may be evidential, the land must be shown to be substantially similar. *Ib.*
4. The land is to be valued in the condition in which it was on the date of filing the petition and order, fixing the time and place for the condemnation proceedings. *Pamph. L. 1900, p. 81, § 6. Ib.*

See also EXPERT WITNESSES, 1, 2, 3.

CONFLICT OF LAWS.

1. Where an accident happens in another state and the injured party sues for damages resulting from that accident in a court of this state, and it is not shown that in the situation presented there could be no recovery as matter of law in the state where the injury happened, and there is sufficient evidence to go to the jury upon the question of dam-

Contempt.

ages having been sustained by the plaintiff, the *lex fori* governs. *Fortein v. Del., Lack. & W. R. R. Co.*, 137

2. Remedies are to be regulated and pursued according to the *lex fori*, the law of the place where the action is instituted. *Smith v. Smith*, 282

See also COVENANTS, 1.

CONSTITUTIONAL LAW.

The legislature cannot deprive a man of his right to be indicted by a grand jury in case a charge of a crime at common law is made against him by enacting that his conduct shall make him a disorderly person punishable in a summary manner under the Disorderly Persons act. *State v. Rodgers*, 60

See also CRIMINAL LAW, 1, 2.
OCCUPATION TAX.

CONTEMPT.

1. A proceeding in contempt, the sole purpose of which is the punishment of the alleged contemner, and the vindication of the dignity and authority of the court, is not reviewable by an appellate tribunal, in the absence of legislative authority, except for lack of jurisdiction in the court in which the proceeding is had. *Atty-Gen. v. Verdon*, 494
2. Section 2 of "An act providing for the review of conclusions and judgments for contempt of court" (*Pamph. L. 1884, p. 219; Comp. Stat., p. 1736, § 138*), makes it mandatory upon the Supreme Court in all appeals taken thereunder to rehear the matter of contempt upon which the conviction was founded, *de novo*, both upon the law and upon the facts. *Ib.*

*Contracts.**Contracts.*

3. A person who has been proceeded against in a court of law in this state, on a charge of contempt, the sole purpose of the proceeding being to punish the alleged contemner and vindicate the dignity and authority of the court, is not, as a matter of right, entitled to have the procedure conducted by the submission of interrogatories. *Ib.*

CONTRACTS.

1. The board of commissioners of a municipality, relying upon the statement of a bidder for a municipal contract that he had no connection with any other bidder, awarded him a contract for paving. It afterward appeared that he was superintendent of the plant of the only other bidder for the work. *Held*, that the award of the contract was made under a false representation, and will therefore be set aside. *Milner v. Hoboken*, 167
2. The powers of an architect under whose direction a building is being erected, and the force and effect of any certificate he may give, are determined strictly by the contract. *Ferber Const. Co. v. Hasbrouck Heights*, 193
3. Where in a suit for compensation under a building contract it appears that by the contract the architect had power by his certificate to determine conclusively that the contract had been completed, but had no power to determine how much the contractor upon completion was entitled to be paid, the mere written request of the architect that the owner pay a certain named sum to the contractor on the completion of certain substantial items therein specified, is no bar to the owner's counter-claim for damages for delay in completion. *Ib.*
4. A resolution, adopted by the board of directors of a traction company, directing its officers to execute, with a municipality, immediately after the passage, by the municipality, of a new ordinance which would be less harmful to the company's interest, an agreement, already prepared (a copy of which was set forth in the resolution), providing for a fixed rate of fare to be charged on its lines, and in consequence of which resolution the ordinance in question was passed, constitutes a binding and valid agreement, notwithstanding that the agreement in question was not signed by the officers of the traction company as directed by the resolution. *Trenton & Mercer County Traction Corp. v. Trenton*, 378
5. The benefit to the traction company of what was omitted from the ordinance, in the way of drastic provisions inimical to its interests, was a sufficient consideration for the agreement. *Ib.*
6. Whether the mere act of passing the ordinance in pursuance of the agreement would be a sufficient consideration, in a legal sense, *quære*. *Ib.*
7. Where a bond refers to another contract and is conditioned for the performance of the specific agreements set forth therein, such contract, with all its stipulations, limitations or restrictions, becomes a part of the bond and the two should be read together and construed as a whole. *Standard Gas Power Corp. v. New Eng. Cas. Co.*, 570
8. A bond given by a contractor and his surety to the Passaic valley sewerage commissioners, conditioned that it shall be void if the contractor shall pay for all labor and materials furnished, and shall perform all the obligations of his contract for build-

Contracts.

ing a sewer (by which contract he agreed to save harmless the commissioners from claims for labor and materials), is limited to an indemnity of the obligee and is not made for the benefit of persons who furnish materials to the contractor, even though the contract further provided that the commissioners might pay claims for labor and materials used in the work and call upon the contractor to repay the same, or might retain funds in their hands, due or to become due to the contractor, for that purpose. *Ib.*

9. The statute (*Comp. Stat.*, p. 4059, § 28) permitting a third party not privy to a contract and who has given no consideration, to sue thereon, is limited to those for whose benefit the contract is made, and does not extend to third parties who indirectly and incidentally would be advantaged by its performance. *Ib.*

10. Plaintiff, an architect, was employed to make plans and specifications for a new building. A dispute having arisen respecting the amount of his compensation, the parties agreed in writing that he should be paid \$1,500 for said plans and specifications and supervising the construction of the building, \$750 of which was payable upon the completion of the plans and specifications, \$375 when the building was half completed, and the remainder upon completion. The \$750 was paid upon the signing of the agreement but the defendants never proceeded to the construction of the building. *Held*, in a suit by the architect to recover for his services, that the written contract was controlling as to the rate of compensation and that the amount of same was to be determined according to the rule laid down in *Kehoe v. Ruthenford*, 56 N. J. L. 23. *Stephen*

Corporations.

v. Camden and Phila. Soap Co., 75 *Id.* 648, distinguished. *Kitchell v. Crossley*, 574

11. The plaintiff in consideration of the execution of an agreement of indemnity to it by defendants, executed a surety bond to the town of Harrison, New York, for the due performance of the contracts of the defendant company, with the town. The indemnity agreement provided for the payment of annual premiums during the continuance of the work, and the payment of incidental expenses in case of suit. The only affirmative defence pleaded, was that the contracts were completed before the maturing of the annual premium sued for. The proof showed otherwise, and no contradiction of the substantial allegations of the plaintiff's loss being apparent, the trial court directed a verdict for the plaintiff. *Held*, upon review of the testimony, that the action of the trial court was not erroneous. *Title Guar. & Surety Co. v. Fusco Const. Co.*, 630

See also MUNICIPAL CORPORATIONS (POWERS, &C.), 1, 2.
PUBLIC WORK.

CORPORATIONS.

1. A subscription to the stock of a proposed corporation, to be organized under a specified name and for certain designated purposes, imposes no obligation upon the subscriber to take stock in a company afterward organized by the same promoters under the same corporate name, but for radically different purposes. *Collings v. Allen*, 5
2. Under the supplement to the act concerning corporations, approved March 23d, 1900 (*Pamph. L.*, p. 316; *Comp. Stat.*, p. 1620, § 31a), no corporation organized under the

Covenants.

laws of this state can be dissolved until all taxes levied upon or assessed against the corporation by the state shall have been paid. The connection of the words "levied" and "assessed," by the conjunctive "or," indicate, that two different acts were meant, therefore, taxes levied, although not yet assessed, must be paid before the corporation can be dissolved. *American Woolen Co. v. Edwards*, 69

3. The annual corporation license fee or corporation tax cannot be said to be assessed until the state board has ascertained the amount of the tax and certified it to the comptroller, pursuant to *Comp. Stat.*, p. 5291, pl. 505.

Ib.

4. The corporation license fee, or franchise tax, provided for in *Comp. Stat.*, p. 5288, pl. 504, is called by the legislature an annual license fee, which suggests a payment in advance. Under the statute, the levy is completed and the year for which the tax is paid begins on the first Tuesday in May, that being the date fixed for the return by the corporation to the state board, which latter body has merely to calculate the amount of the tax based upon such return, except where the corporation neglects or refuses to make a return.

Ib.

5. Upon the dissolution of a corporation, the secretary of state is not required to issue a certificate of dissolution unless the certificate of the comptroller that the state taxes have been paid has been filed with him, pursuant to the provisions of the act of 1900 (*Comp. Stat.*, p. 1620, § 31a).

Ib.

6. Whether a company, formed under the General Corporation act for general business, may exer-

Crimes.

cise the power and claim the privileges expressly conferred by exceptional legislation upon a distinctive species of corporation, created for the purpose of performing a *quasi*-public function, and existing specially for the purpose therein prescribed, *quare. Fairview Heights Cemetery Co. v. Fay*, 427

See also CRIMINAL LAW, 3.
EVIDENCE, 5, 6.

COVENANTS.

1. A judgment or decree entered in the courts of the state of Iowa, under proceedings to foreclose a mortgage and for the redemption of the land, by paying the amount due on a judgment, such decree and proceedings are *prima facie* evidence of the validity of the mortgage, of the amount due thereon, of the lands upon which the same were a lien, of the extent of the lien, and of the right of redemption. This is so, when such judgment or decree is put in evidence, in a suit brought in the New Jersey courts, to recover damages for a breach of the covenants against encumbrances, contained in deeds conveying the lands covered by the mortgage foreclosed. *Smith v. Smith*, 282

2. There is no statute of limitations in New Jersey, in an action for breach of a covenant against encumbrances.

Ib.

3. Actual eviction is not necessary, before an action will lie for the breach of a covenant against encumbrances. It is sufficient that eviction may take place.

Ib.

CRIMES.

See ABORTION, 1, 2, 3.
RECEIVING STOLEN GOODS.

*Criminal Law.**Criminal Procedure.***CRIMINAL LAW.**

1. The question whether the offence with which a man is charged is a crime at common law, cannot be made to depend on a mere matter of nomenclature. It depends on the real case presented. *State v. Rodgers*, 60
2. One who, when "good and drunk," drives a large automobile on a public street of a city, and through the front window of a saloon, breaking the glass and framework of the window, and driving the front of his car to the front of the bar, is guilty of a public nuisance at common law. *Ib.*
3. A corporation aggregate may be held criminally for manslaughter. *State v. Lehigh Valley R. R. Co.*, 372
4. An indictment in the statutory form charging a corporation aggregate with manslaughter will not be quashed for failure to specify whether voluntary or involuntary manslaughter is meant. *Ib.*
5. It is no valid objection to an indictment that the foreman of the grand jury which found it was at the time a candidate for the office of freeholder, and, in his canvass, had suggested that the members of the existing board, of whom the defendant was one, were not to be trusted with the management of the county government, when neither malice nor ill-will is averred. *State v. Pullin*, 377

See also **ABORTION**, 1.

CONSTITUTIONAL LAW, 1.
CRIMINAL PROCEDURE, 5.
IMPEACHMENT, 1, 2.
TRIAL, 1, 2.

CRIMINAL PROCEDURE.

1. An erroneous statement of law by the prosecutor of the pleas in

arguing before the jury cannot be made a ground for reversal under section 136 of the Criminal Procedure act, where no application is made to the court to deal with the statement. *State v. Fish*, 17

2. At common law, a bill of exceptions was not allowable in a criminal case. Error was assignable only upon the record. *State v. Hart*, 261

3. The right of review for trial errors, on bills of exceptions, in criminal cases, is given by the statute of this state, solely to the defendant. *Ib.*

4. A writ of error will not lie in favor of the state, to review a judgment of acquittal. *Ib.*

5. Where an acquittal is had in a court of competent jurisdiction, having jurisdiction of the person and the crime with which he is charged, it is an acquittal within the meaning of the provisions of article 1, paragraph 10, of the state constitution, even though such acquittal was the product of trial errors. *Ib.*

6. In order that a defendant may have the benefit of section 136 of the Criminal Procedure act (*Comp. Stat.*, p. 1863), the trial judge must, in addition to the formal and ordinary return to a writ of error, certify that the proceedings transmitted by him to the court of review comprise the entire record of the proceedings had upon trial. And where the defendant neglects to obtain such a certificate, the review is limited to alleged errors arising on the face of the record itself or upon bills of exceptions duly taken. *State v. Hop*, 390

7. A lack of sufficient evidence to make out the case charged in the indictment is not a ground for arresting judgment. In order to

Damages.

raise such a question there should have been a request to direct an acquittal or to charge in conformity with the contention. *Ib.*

DAMAGES.

Where damages may be sustained by the breach of a single stipulation, and are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum of money for such breach and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. *Ferber Cons. Co. v. Hasbrouck Heights*, 193

See also PUBLIC POLICY.
TIMBER, 2.

DECEIT.

The plaintiff was owner of some real estate, which he was induced to part with, by the defendant, in exchange for a bond and mortgage for \$3,000 which it was represented to him was made by a responsible business man, who was owner of the property. The fact turned out to be, that the so-called owner was a "dummy," who was paid by defendant to represent himself as owner, and to exercise acts of ownership about the property, as well as to execute the bond and mortgage, which was without consideration, and valueless. In an action for deceit, the jury having found for the plaintiff, no errors of procedure or errors in the charge of the court being apparent, the judgment is affirmed. *Martin v. Baldwin*, 241

DEDICATION.

A declaration, by the husband of the then owner of land, that if

Descent.

he opened streets through it the opening would conform to a certain map, lacks the essentials of a legal dedication—*first*, because it is not made by the owner of the *locus*, and *secondly*, because at most it is but a promise or agreement to dedicate *in futuro*. *N. Y., Susq. & W. R. R. Co. v. Public Utility Bd.*, 432

DENTISTRY.

1. Proceedings under the act of 1915 (*Pamph. L.*, p. 261) for illegal practice of dentistry are essentially a civil suit, subject to the procedure of the court in which they are brought. The defendant is entitled to jury trial if demanded. *Lowrie v. State Bd. of Dentistry*, 54
2. In a complaint under the act of 1915 (*Pamph. L.*, p. 261) for illegal practice of dentistry, it is enough to charge illegal practice in the language of the statute without setting forth specific instances, to aver that the illegal practice was during a named month without specifying the days, and that it was at defendant's office in a named city without further specifying the place. *Ib.*

See also INSURANCE, 5, 6.

DESCENT.

The testator devised to his wife for life his real estate and after her death to his three children, each a distinct parcel specifically described, subject, among others, to this proviso: "In Case my Son Harry W. Minchin Should depart this life without Issue His Share will go to my Dauter Emma Jane Minchin;" Harry survived the life tenant and Emma died during the life tenancy, leaving a child. The life tenant conveyed to Harry all her interest in the lands de-

Disorderly House.

vised to him. *Held*, that Harry having survived the life tenant and the executory devisee, Emma, his estate in the land devised to him became absolute for two reasons—(a) because the words “depart this life without issue” were properly referable to the death of the life tenant and not to the devisee, applying *Paterson v. Madden*, 54 N. J. Eq. 714; (b) that by the death of the executory devisee, Emma, in the lifetime of Harry, the gift over became impossible of performance, and that the estate of Harry, the first taker, became absolute, applying *Den v. Schenck*, 8 N. J. L. 29, and *Drummond’s Executor v. Drummond*, 26 N. J. Eq. 234. *Michael v. Minchin*, 603

DISCOVERY.

See ORPHANS’ COURT, 1.

DISORDERLY HOUSE.

1. On a prosecution for keeping a disorderly house, evidence of acts and conduct upon the part of the defendant tending to show that he was occupying the house and using it as his own, and exercising the same control over it that men usually have over their own houses, is sufficient to authorize the jury to find that he kept the house. *State v. Frank*, 78
2. On a prosecution for keeping a disorderly house, evidence that the defendant exhibited at his house a chart showing horses’ names, where running, and the odds that he laid against them; that his patrons there present delivered to him the money which they bet, together with slips recording their names, the horses’ names, and the odds; and that when his patrons won the defendant paid the winnings, is sufficient to justify the jury in finding that betting upon horse

Disorderly Persons.

racing was carried on, even though there was no more definite proof that the races had been actually run. *Ib.*

3. On a prosecution for keeping a disorderly house, testimony given by detectives in the employ of the state that bets on horse races were made by them, and by others in their presence, with the defendant at his house, was competent evidence, its weight and credibility being for the jury to determine. *Ib.*
4. On a prosecution for keeping a disorderly house, the state asked a witness, “Do you know where this defendant’s place is?” Against the defendant’s objection, the judge directed the witness to answer “yes or no.” The witness answered “Yes.” Then without any further objection the state asked “Where?” and the witness answered “800 Park avenue, Hoboken,” and gave testimony as to the presence, acts and conduct of the defendant there (no part of which defendant denied), from which the jury could and did find that the defendant kept the house. *Held*, that even if the question objected to was improper, it could not have prejudiced the defendant in maintaining his defence upon the merits, and so should not result in a reversal. *Ib.*

DISORDERLY PERSONS.

A conviction setting forth that the defendant operated an automobile on High or Main street in the town of Mount Holly, township of Northampton, &c., while under the influence of intoxicating liquor, sufficiently shows a violation of the act of 1913 without finding that High or Main street was a public street. *Curtis v. Joyce*, 47

See also CONSTITUTIONAL LAW.
CRIMINAL LAW, 1, 2.

*District Courts.**Elections.*

DISTRICT COURTS.

ELECTIONS.

1. Upon a trial before the District Court without a jury, it was not error to deny the plaintiff's request for a voluntary nonsuit made after the court had announced that judgment was given for the defendant. *Ciesmelewski v. Domalewski*, 34

2. A general demand for a jury made two days before the time fixed for trial, whenever that may be, with proper notice to the clerk, is sufficient. The demand does not have to be for the return day or any particular day, but if given for a specific date, which would normally be the day for trial, it is valid if the required notice be served as directed by the statute. *Consolidated Gas, etc., Co. v. Blanda*, 135

3. Where the defendant, in a District Court, demanded a trial by jury, and during the progress of the trial, the court, upon the motion of the plaintiff, dismissed the jury, and adjourned the case, and upon the next day fixed for the trial under the objection of the defendant proceeded to hear the case without a jury, and gave judgment for the plaintiff—*Held*, that the proceeding was irregular, and that the defendant under the circumstances, could not be deprived of his right to a trial by jury. *Crossley v. Connolly Co.*, 238

See also APPEAL AND ERROR, 8.
MECHANICS' LIEN.
RES ADJUDICATA, 1.

EJECTMENT.

By the statute (*Comp. Stat.*, p. 2056, § 13), in an action of ejectment for land occupied by the defendant, a plea of not guilty admits such possession as excludes the plaintiff. *Rogers v. Warrington*, 653.

1. A petition for a recount, stating that the petitioner has reason to believe that an error has been made by various boards of election sufficient to change the result of the election and that the written return in one district varied from the report in figures, is sufficient to properly invoke the jurisdiction of the Supreme Court to make an order for a recount under section 159 of the Election law. *Seglie v. Ackerman*, 118

2. The granting of an application for a recount under section 159 of the Election law is not dependent upon the final result as declared by the board of county canvassers, and may be made before such result is officially determined. *Ib.*

3. It is not necessary to the validity of a recount that the justice of the Supreme Court, making the order, be actually present and presiding at the recount. The statutory mandate that the recount shall be under the direction of the justice simply puts a recount under his judicial control or direction, which direction may be properly exercised by the justice out of the presence of the board by an order, in writing, or verbally in the presence of the board. *Ib.*

4. The power conferred by statute upon a justice of the Supreme Court to grant a recount to be had under his direction is not limited in its exercise by him in his individual capacity as such justice, but upon the judicial office, irrespective of the individual invested therewith. *Ib.*

5. The provision of the act of April 7th, 1914, commonly known as the Preferential Voting act (*Pamph. L.*, p. 170) that "all ballots shall be void which do

Eminent Domain.

not contain first choice votes for as many candidates as there are offices to be filled," is not separable from the other provisions of the statute so that it may be rejected and the residue of the statute be permitted to stand; hence, if such provision be unconstitutional the act as a whole fails and an election held under its terms is incapable of conferring a *de jure* title to a private relator under section 4 of the *Quo Warranto* act. *Daly v. Garven*, 512

6. In *quo warranto*, when a defeated candidate for an elective office, in order to obtain a judicial determination that he received a plurality of the ballots cast at such election, seeks a decision as to the unconstitutionality of the statute under which the election was held, which is fatal to his *de jure* title to the office, the court, in view of the futility of deciding the question, will decline to pass upon it. *Ib.*

See also TOWNSHIPS.

EMINENT DOMAIN.

In a proceeding for the taking of lands under the Eminent Domain act, the omission as parties of owners of land in whose favor an easement of way exists across the land to be taken, will not entitle the general owner to have the order for appointment of commissioners set aside. *Rowland v. Mercer Co. Tract. Co.*, 82

ERROR.

A judgment for appellant for nominal damages, although erroneous, will not be reversed if he was not entitled to any damages. *Bouquet v. Hackensack Water Co.*, 203

See also CRIMINAL PROCEDURE. 4.

Evidence.

EVIDENCE.

1. The admission of illegal testimony, in cases tried by a special tribunal, such as a city commission, will not have the effect to invalidate the findings of that tribunal so long as it appears that there is competent testimony in the case to support such findings. *Crane v. Jersey City*, 109
2. The president and general manager of a corporation having control of its books of account and the direction of entries made therein, claiming to have loaned the corporation money, brought suit to recover, and the corporation, under a new management, set up payment. The plaintiff's account in the ledger as kept while plaintiff was in control, showed a credit to plaintiff for the amount of the loan and a debit for a like sum, the entries having been made by plaintiff's agent by his direction. *Held*, that the ledger was admissible evidence of an admission by plaintiff that the loan was satisfied, the entry made by him being against interest. *Reed v. Atlantic City Suburban, &c., Co.*, 231
3. While a party cannot impeach a witness called by him, which is done by showing by general evidence that he is unworthy of belief, he may, nevertheless, show that such witness has made other and different statements from those to which he has testified. That is contradicting, not impeaching, the witness. *For v. Forty-Four Cigar Co.*, 483
4. In a suit brought to recover damages for property destroyed by fire through the failure of the defendant railroad to use reasonable care to keep its right of way in New York State clear of combustible materials, a written statement made by the defend-

*Executions.**Expert Witnesses.*

ant's general manager (who was charged with the duty of maintenance and care of such right of way), to the public service commission of New York (when it was conducting a legally authorized investigation of the fire) to the effect that, at the time of the fire, the defendant company had not cleared its right of way of combustible materials, was admissible in evidence against the defendant company. *Christy v. N. Y. Cent. & H. R. R. Co.*, 540

5. The general rule is that when a corporation authorizes an attorney to speak for it, the corporation may be confronted by testimony as to what was said by such attorney within the scope of his authority. *Ib.*

6. Where a railroad company had authorized its attorney to act and speak for it at a legally authorized hearing by the public service commission at which a fire along the company's right of way, and the company's connection therewith, was under investigation, evidence as to such attorney's statements then and there made with respect to combustible matter on such right of way at the time of the fire, are admissible in evidence against the company in a suit involving that issue, subject to the latter's right to disprove, rebut, or explain such statements. *Ib.*

7. Parol evidence that a certain person was foreman of the grand jury and administered the oath to defendant as such foreman at a session of the grand jury, is competent on the trial of an indictment for perjury before the grand jury, as evidence that he was in fact such foreman. *State v. Monetti*, 582

See also COVENANTS, 1.
DISORDERLY HOUSE, 3, 4.

EXECUTIONS.

Proceedings taken in District Courts under the supplement of 1915, page 182, to the Executions act, by way of garnishing a debt due the defendant in execution, are reviewable properly by *certiorari* and not by appeal. *Gordon v. Pannaci*, 392

EXECUTORS AND ADMINISTRATORS.

In an action brought by an administrator under the "Death act" a motion to *non pros.*, if granted, is without costs against the plaintiff. The case of *Kinney, Administrator, v. Central Railroad Co.*, 34 N. J. L. 273, followed. *Ellis v. Penna. R. R. Co.*, 349

See also TAXES AND ASSESSMENTS, 2, 3.

EXPERT WITNESSES.

1. Who is an expert on the value of land, under our decisions, must be left very much to the discretion of the trial judge; his decision is conclusive, unless clearly shown to be erroneous in matter of law. *Ross v. Comrs. Palisade Interstate Park*, 461
2. The dominant circumstances forming the qualification of expert witnesses as to land values consist of the fact either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question, within recent periods, or that they have knowledge of such sales by others. *Ib.*
3. The mere fact that a witness owns the land, but has no special knowledge of values, does not qualify as an expert so as to give an opinion as to the value of the land. *Ib.*

*Federal Employers' Liability Act.**Fire and Police.***FEDERAL EMPLOYERS' LIABILITY ACT.**

1. The Federal Employers' Liability act, within its scope, viz., interstate commerce, deals with the same subject that is dealt with by the New Jersey Workmen's Compensation act under which the duty of an employer to make compensation to an employe for injuries arising out of the employment may exist independently of the negligence of the employer; whereas, the federal statute makes such duty to depend upon such negligence and excludes the existence of such duty in the absence of negligence. The federal act being thus comprehensive, both of those cases in which it excludes liability and of those in which it imposes it, ousts the Courts of Common Pleas of this state of jurisdiction under the New Jersey Workmen's Compensation act to award the compensation to be paid by a carrier to its employe for injuries received by the latter while both were engaged in interstate commerce. *Rounsaville v. Central R. R. Co.*, 176

2. In an action under the Federal Employers' Liability act, it was open to the jury to infer from the evidence that the plaintiff's intestate was engaged in removing snow from the tracks, both interstate and intrastate, of a railway; that the work had been only temporarily suspended; that the men were told by the boss to go in a covered car as it was raining and freezing at the time; that to do so, they walked along the tracks because they couldn't go otherwise, and decedent was struck and killed by a fast passenger train considerably behind time; that there was a failure to warn him that the passenger train was behind time and might be expected. *Held*, that it was for

the jury to say whether the decedent was engaged in interstate commerce, whether there was negligence on the part of the railway company, and whether the decedent had assumed the risk. *Armbrecht v. Del., Lack. & W. R. R. Co.*, 529

See also WORKMEN'S COMPENSATION, 13.

FERRIES.

See NEGLIGENCE, 2.

FIREMEN'S RELIEF ASSOCIATIONS.

See INSURANCE, 1.

FIRE AND POLICE.

The statute of 1911, entitled "An act to authorize any incorporated town in this state to purchase fire engines, or other fire apparatus, equipment and appliances, for protection against fire, and to provide a method for raising money for the payment thereof," as amended March 28th, 1912 (*Pamph. L.*, p. 358), was not intended to curtail the powers conferred by the General Town act (*Pamph. L.* 1895, p. 218) with reference to that subject, but was intended to enlarge such powers, by permitting the issue of bonds where the purchase of fire apparatus was reasonably necessary, but other pressing expenditures made it inadvisable to provide the moneys necessary for the purchase out of the annual tax levies. *Bauer v. West Hoboken*, 1

FOOD AND DRUGS.

In an action to recover a penalty for violating the provisions of the Pure Food law (*Pamph. L.*

Franchise Tax.

1915, p. 665, § 1) commenced in the small cause court, the Court of Common Pleas of the county in which the action is brought has jurisdiction to hear the case on appeal. *Department of Health of N. J. v. Monheit*, 448

FRANCHISE TAX.

1. The act of 1906 (*Pamph. L.*, p. 644) requiring an annual franchise tax upon the annual gross receipts of any street railway corporation or upon such proportion of such gross receipts as the length of its line in this state upon any street, highway, road, lane or other public place bears to the length of its whole line, clearly requires that the tax should be calculated upon all gross receipts, irrespective of whether or not they are receipts for transportation, and was intended to provide a specific scheme for the taxation of the street railway corporations and to differentiate such corporations from corporations liable to the franchise tax under the act of 1903. *Pamph. L.*, p. 232. *Atlantic Coast Elec. Ry. Co. v. State Bd. T. & A.*, 353
2. The annual license fee or franchise tax, imposed upon corporations by *Pamph. L.* 1906, p. 31, amending the supplement of 1901 (*Pamph. L.*, p. 31) to the act of 1884 (*Pamph. L.*, p. 282), is payable each year in advance, the year beginning with the first Tuesday of May. *Old Dominion Copper Mining, &c., Co. v. State Bd. T. & A.*, 364
3. Owners of franchises whose business is the sale of their commodities or services, gas, electric current, electric communication, steam or water, with whom the means of transportation—wires or pipes—are only the necessary means of delivering their commodities, are not transportation

Garbage and Ashes.

companies under section 4 of the Voorhees Franchise Tax act of 1900 as amended (*Comp. Stat.*, p. 5299, pl. 530), and, consequently, are taxable under section 5 of that act (*Comp. Stat.*, p. 5299, pl. 531) on the whole of their gross receipts, irrespective of whether such receipts are from the sale of commodities or for its mere transportation. *N. Y. & N. J. Water Co. v. Hendrickson*, 537

See also CORPORATIONS, 4.

FREE PASSES.

See RAILROADS, 1.

GARBAGE AND ASHES.

1. A town has the authority to provide for the collection and disposal of ashes and garbage in either of two ways, but not otherwise—first, it may provide for the doing of the work by the town itself. If it adopts this course, it must do so by ordinance, with all of the formalities necessary to enact a valid ordinance; second, it may make a contract with some one to do the work. But where more than \$500 is to be expended, it has no authority to make a valid contract until it has first publicly advertised for bids, and the contract can then be awarded only to the lowest responsible bidder. *Eckert v. West Orange*, 545
2. Where a town has contracted for the removal of ashes and garbage involving an expenditure of more than \$500, without complying with the provisions of chapter 342 of the laws of 1912 (*Pamph. L.*, p. 593) requiring advertisement for bids and award to the lowest responsible bidder, there can be no recovery on a *quantum meruit* for services rendered under such *ultra*

*Grade Crossings.**Impeachment.*

vires contract after the service upon the contractor of the writ of *certiorari* sued out to review the validity of the contract. *Ib.*

GRADE CROSSINGS.

The declared object of the Fielder Grade Crossing act (*Pamph. L. 1913, p. 91*) is to protect the public from danger incident to grade crossings. Consequently, where it appears that the danger incident to a proposed grade crossing can be obviated by a slight change in the line of streets, which can be made to practically serve the public use and convenience, the adoption of such a plan would seem to present a satisfactory substitute, and the permission granted by the Public Utility Commission for the construction of such grade crossing should be vacated. *N. Y., Susq. & W. R. R. Co. v. Public Utility Bd.,* 432

See also RAILROADS, 3.

GRAND JURY.

A witness who has been examined before the grand jury is under no legal obligation to refrain from stating what was said to or by him while there. *State v. Fish,* 17

HABEAS CORPUS.

See PRACTICE, 4.

HEALTH.

1. It is not an unreasonable exercise of police power by a city to require an abutting landowner to connect his buildings with a public sewer, notwithstanding he may already have a private sewer. The object of such a health code is the sanitary condition of dwellings, the preven-

tion of disease, and the maintenance of public health, and this may be done by the prevention of nuisances as well as their abatement. *Fenton v. Atlantic City,* 403

2. It is no answer to a prosecution for the violation of an ordinance requiring that adjacent buildings be connected with a public sewer, that it discharges in the same body of water as the private sewer, and an offer to prove that fact was properly overruled. *Ib.*

3. Anything injurious to public health may be a nuisance, and it is as much the duty of a board of health to prevent a condition likely to be detrimental to public health, as to abate it after its evil consequences appear. *Ib.*

HIGHWAYS.

1. In New Jersey, the fee in the lands over which highways have been laid, is in the abutting owner. *Rogers v. Warrington,* 653

2. The owner of the fee, for the soil in the highway, may maintain an action of ejectment against any person wrongfully taking or claiming exclusive possession of the same. *Ib.*

IMPEACHMENT.

1. Courts of impeachment in the United States perform no punitive function. The single purpose of their existence is the protection of the people against public servants who have betrayed their trust and have violated the law which they were sworn to obey. *State v. Jefferson,* 507

2. A judgment of conviction, in impeachment proceedings, under

Infants.

article 6, section 3, of the state constitution, is not a condition precedent to the indictment of a prosecutor of the pleas for malfeasance in office and punishment thereunder. *Ib.*

INDICTMENTS.

See CRIMINAL LAW, 4, 5.

INFANTS.

1. The owner of an automobile lent it to an infant, by whose unskillful driving the car was injured. *Held*, that an action in tort against the infant will not lie. *Brumhoelzl v. Brandes*, 31
2. The liability of infants for their torts and their immunity from liability for their contracts cancel each other in so far as the gravamen of the tort and the breach of the contract have a common basis of fact, the rule being that an infant cannot be held liable for a tort that would in effect be the enforcement of his liability on his contract. *Ib.*

INHERITANCE TAX.

See SUCCESSION TAX.

INITIATIVE.

See COMMISSION GOVERNMENT, 1.

INSOLVENT DEBTORS.

1. Because the plaintiff did not produce affirmative proof that his judgment debtor, who petitioned for discharge under the Insolvent Debtors' act, did not appear in person at every subsequent court until discharged, the motion to nonsuit should have been granted, and failing that—this lack of evidence not having been supplied in the further progress of the trial—the motion to direct a verdict should have been

Instructions to Juries.

granted; and, therefore, the direction of a verdict for the plaintiff was erroneous. *Sholes v. Eisner*, 151

2. The defendant having appeared at the term of the Common Pleas Court, next after presenting his petition, and having been then and there examined, and the court, which could have granted his discharge within that term, held the matter under advisement until a subsequent term and then granted it, the discharge, when so granted, operated to discharge the debtor's sureties on the bond, because the court could not lawfully have granted the discharge unless it were satisfied that the debtor's conduct had been fair, upright and just, which, perforce, must include compliance with the terms of the act which alone would entitle the debtor to his discharge, and which, the discharge, necessarily presupposes that there had been no breach of the condition of the bond. *Ib.*
3. The discharge of an insolvent debtor is a release by act of law from performance of the condition of the bond. *Ib.*
4. It is a general rule that the discharge of the principal works a discharge of the sureties on a bond. *Ib.*

INSTRUCTIONS TO JURIES.

1. An excerpt from instructions to a jury upon which error is assigned must be read in connection with the context and if, when taken together, no error appears, the excerpt alone will not support the assignment. *Shoeffler v. Phillipsburg Horse Car R. R. Co.*, 235
2. The trial court in charging the jury as to the amount of force to be used in ejecting a passen-

Insurance.

ger improperly on defendant's car said, by way of illustration, that if a passenger refused to leave the car, "And he pushed him off, that is all that would be necessary." *Held*, that this was not an instruction that defendant might push a passenger off the car regardless of consequences, the words "Would be necessary" meaning, in the connection used, that if the push accomplished the ejection, that was all the force defendant was permitted to use. In other words, the defendant had used all the force that was necessary under the conditions stated. *Id.*

3. When a party asks for an instruction which is partly good and partly bad, it is proper to refuse it altogether. *Christy v. N. Y. Cent. & H. R. R. Co.*, 540

4. In a case where the defendant was charged with negligence because of defective premises, an instruction to a jury "That if the defendant company had, at any time, before the accident, either knowledge or notice of a dangerous condition of its premises, it would have been negligence on the part of the company not to have remedied this condition," is erroneous, because the defendant is entitled to a reasonable time to inspect, discover and repair such defect. "At any time before the accident" includes immediately prior. *Collins v. Central R. R. Co.*, 593

5. An erroneous instruction is not cured by a subsequent correct one, unless the illegal one is withdrawn. *Id.*

INSURANCE.

1. The act of 1885, requiring the payment of a percentage on premiums received by foreign fire

Insurance.

insurance companies for the benefit of firemen's relief associations, does not authorize the Court of Common Pleas to impose the penalty or forfeiture therein provided for, or to enter a judgment for damages by summary proceedings. *Van Roden v. Strauss*, 64

2. It is competent, for a reinsuring company to agree to be directly liable, to a policy holder, by the terms of the reinsurance agreement. In this case, the defendant company became directly liable to the plaintiff. A complaint, with the reinsurance agreement attached and made a part thereof, which alleges that the defendant company assumes all liabilities, &c., is sufficient. *Meyer v. National Surety Co.*, 126

3. The endorsement by an insurer on a fire insurance policy, of consent to change of ownership in the property insured, without more, is not to be construed as an agreement by the company to become liable to the new owner for a loss occurring after the ownership actually changed but before the consent was given. *Sciller v. Home Ins. Co.*, 587

4. An insurance company, by its policy, contracted to pay the assured a weekly indemnity so long as he should be totally disabled and wholly and continuously prevented from performing any and every kind of business relating to his occupation. The business of the assured was that of a traveling salesman, which required a constant use of his feet, and during the term of the policy he was afflicted with a foot ailment which entirely prevented him from traveling and soliciting business, although during part of the term for which he claimed indemnity he was able to go to the office of his employer and conduct some bus-

Insurance.

iness by writing letters and the use of the telephone. The trial court instructed the jury that the reasonable construction to be put upon the language used was, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, but that if he be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation, he was entitled to recover. *Held*, that such an instruction was not error. *Gross v. Commercial Casualty Ins. Co.*, 594

5. The terms of a policy of insurance, made between the insurance company and a dentist, to protect the dentist "against loss from the liability by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error, or mistake or malpractice occurring in the practice of the assured's profession as described in the application" and "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person in consequence of any alleged error or mistake or malpractice, by any assistant of the assured while acting under the assured's instructions" contained, among others, the provision that the company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured. *Held*, that the insurance company was not liable, under the policy of insurance, to the assured, for damages recovered against him for the malpractice of an assistant, who was held out, by the assured, to the public and to the insurance company, as a licensed dentist, whereas, in fact, the assistant was, to the knowledge of

Intoxicating Liquors.

the assured, not licensed to practice and was acting in direct violation of the laws of the state covering the practice and licensing of dentists. *Betta v. Mass. Bonding & Ins. Co.*, 632

6. *Held*, also, that under the terms of the policy, in order for the assured to recover, it must appear that the error, mistake or malpractice of the assistant occurred while acting under the assured's instruction. *Ib.*
7. A finding of fact by the District Court, supported by evidence, that, in the application for a policy of life insurance, a statement, that the insured was not suffering from consumption was a willful untruth, vitiates the policy. This in effect is a finding that the policy was procured by fraud. *Duff v. Prudential Ins. Co.*, 640
8. By statute *Pamph. L. 1907, p. 133, § 1 (4)* statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. *Ib.*

See also RES ADJUDICATA, 1.

INTOXICATING LIQUORS.

Where a petition for a license to keep an inn and tavern was in the usual form, excepting a provision attached thereto reciting that the *locus in quo* is "a picnic or recreation ground of more than one acre," and there was evidence before the Court of Common Pleas from which that court might properly conclude that the *locus in quo* was of such character, the license so granted, although in the usual form for the keeping of an inn and tavern, is, in fact, a license for "a picnic or recreation ground comprising at least one acre" under the exceptions mentioned in chapter 280 of the laws

*Jitney Busses.**Landlord and Tenant.*

of 1913 (*Pamph. L.*, p. 574), which is intended to limit the granting of licenses for inns and taverns according to a basis of five hundred of population to one inn or tavern. *Deck v. Bell*, 96

JITNEY BUSSES.

The act of 1916 (*Pamph. L.*, p. 283), requiring the owner of jitney busses to comply with certain legislative regulations, and to pay a specified tax into the treasury of the city in which they are operated, imposes a state wide policy of regulation upon all subordinate governing bodies, in the use and regulation of such a method of transportation, but it contains nothing in its provisions to indicate that it was the legislative purpose to repeal the powers of regulation theretofore conceded to municipalities by their respective charters. *Irwin v. Atlantic City*, 99

JURISDICTION.

A defendant who desires to object to the jurisdiction of a magistrate on the ground of bias, should do so before the trial or argument. *Curtis v. Loyce*, 47

See also ORPHANS' COURT, 1.

JURIES.

See DISTRICT COURTS, 3.

JUSTICES' COURTS.

See JURISDICTION.

LACHES.

1. Where the justice and legality of the claim of the widow of a policeman, against a board of police commissioners, for a pen-

sion, have been established subsequent to an adverse ruling on her claim, but which ruling was made without giving her an opportunity to be heard, and the result of which she was in ignorance except for having learned of it some time thereafter in the newspapers, and it appearing that, after learning of such adverse action, she had made endeavors to have the matter reheard, the defendant cannot invoke the equitable doctrine of estoppel or laches, based upon its manifest improper deprivation of the right of the prosecutrix to an existing legal claim, which, but for the initial error in procedure, would have been terminated in her favor. *McGurty v. Newark*, 103

2. Laches under any circumstances is a relative term and is invoked upon equitable considerations to prevent injustice by unsettling rights which have accrued during an interval of apparent repose, due to a claimant's inexcusable inaction. *Ib.*

LANDLORD AND TENANT.

1. When a party enters into possession of premises which he has contracted to purchase, which contract he afterwards successfully repudiates on the ground that the title is unmarketable, and continues to occupy the premises after tender and refusal of the deed, he is liable to the owner for the fair rental value of the premises during the period of occupation. *Wheaton v. Collins*, 29

2. The plaintiff leased certain premises, in the city of Newark from defendant, and having occupied under the lease for a period, attempted to induce the landlord to accept a surrender of the same, which the latter declined to do. The plaintiff then aban-

*Libel and Slander.**Limitation of Actions.*

- doned the premises, and the landlord after an interim of two months, during which the premises remained unoccupied, rented them for a period of years, at an increased rent. The plaintiff basing his complaint on the doctrine of *assumpsit*, instituted suit for the recovery of the excess rent from the landlord; the complaint on motion was stricken out, as not alleging a valid cause of action. *Held*, that since the plaintiff had abandoned the premises, he could claim no interest, either upon the theory of privity of estate or privity of contract, above the amount of rent for which he was obligated under his covenant. *Held, further*, that since the doctrine of *assumpsit* is based upon an implied promise invoked by the law, upon equitable considerations, it can lend no support to a claim by one who while he repudiates his express covenant, seeks at the same time to invoke it as a basis for a claim to incidental profit. *Whitcomb v. Brant*, 245
3. Where a brewing company agreed in writing to let a saloon property "at a monthly rent of \$100, payable in advance," and the tenant agreed "to pay a monthly rental for the premises of \$100 per month, payable in advance," the tenancy thereby created was a monthly tenancy, notwithstanding that the tenant made application annually, and paid an annual license fee for the sale of intoxicating liquors, to the proper authorities, for several years, the fact that the tenant made such yearly application for such license not having the legal effect of changing the terms of the letting. *Breidt Brewery Co. v. Weber*, 641
- LIBEL AND SLANDER.
1. Printed words circulated, charging a member of the grand jury with malfeasance of the gravest character in his office, if untrue, are libelous. *State v. Fish*, 17
2. In a trial of an indictment for libel, it is not permissible to introduce testimony in support of the truth of matters contained in the alleged libelous article but which are not referred to in the indictment or made a ground of charge against the defendant, since, even if it be conceded that the charges at which it is directed be true, it can afford no justification for the untruthful statement which is made the subject of the indictment. *Ib.*
3. A person who circulates a paper containing an untruthful and libelous statement is subject to punishment under indictment, no matter what his motives are or what induces his action. *Ib.*
4. Whenever words clearly sound to the disreputation of the plaintiff they are defamatory on their face and actionable *per se*. *Shaiv v. Bender*, 147
5. A suit lies for words actionable *per se* without proof of special damage. *Ib.*
- See also* GRAND JURIES.
- LICENSE.
- See* NEGLIGENCE. 3, 4.
- LIFE ESTATE.
- See* DESCENT.
- LIMITATION OF ACTIONS.
- The statute limiting the time within which an action for damages for fire occasioned by sparks from a locomotive engine shall be brought, does not require the prosecution of the action to be brought to a finality within the

Mandamus.

statutory period fixed for the bringing of the suit. *Martin v. Lehigh Valley R. R. Co.*, 258

See also COVENANTS, 2.

MANDAMUS.

1. A writ of *mandamus* will not issue to enforce a contractual obligation. In such case a private party has a remedy by an action for damages. *McAllister v. Atlantic City*, 93
2. Objection to the legal sufficiency of a plea to an alternative writ of *mandamus* should be presented by demurrer and not by motion to strike out. The Practice act of 1912 does not apply to pleadings resting on a prerogative writ. *Ib.*

See also SCHOOLS, 3.

STREET RAILWAYS, 4, 5.

MASTER AND SERVANT.

1. Where the master provides his servants with a method of doing his work, which has a direct bearing upon the safety of those employed in such work, a duty arises on the part of the master to use reasonable care to provide a safe method, or at least to avoid a dangerous method if the exercise of reasonable care would produce that result. *Wilczynski v. Penna. R. R. Co.*, 178
2. The duty of a master to use reasonable care to provide a safe method for his employes to do his work, like the duty to use reasonable care to provide a safe place of work, is one that the master owes to his servants, and hence is one for the breach of which the master cannot escape liability by entrusting the performance of such duty to others, be they managers, agents, strangers, volunteers or fellow servants. *Ib.*

Municipal Corporations.

3. The obligation of a master to use reasonable care to provide a safe method of work for his employes cannot be avoided by ordering them to work at an employment in his interest but over which he exercises no control. *Ib.*

MAXIMS.

- Damnum absque injuria*, 624
- Ratio legis est anima legis*, 427
- Volenti non fit injuria*, 250

MECHANICS' LIENS.

In an action brought in a District Court to enforce a mechanics' lien claim, it is not necessary that a return day be named in the summons. The amendment of the act relating to the enforcement of mechanics' lien claims (*Pamph. L. 1912, p. 470*) provides the required form to be used in District as well as Circuit courts in cases brought under that act, and it was error for a District Court to dismiss such a suit for want of a return day in the summons. *Booth & Bro. v. Glasser*, 91

MOTOR VEHICLES.

See CRIMINAL LAW, 2.
DISORDERLY PERSONS.
NEGLIGENCE, 1, 6.

MUNICIPAL CORPORATIONS
[POWERS].

1. Where a bid for a municipal contract is open to the world for competition, and everyone has an equal chance of success in obtaining the award, the fact that the successful bidder has no competition cannot operate to deprive the municipality of its right to award the contract. *Bauer v. West Hoboken*, 1

Negotiable Instruments.

2. The fact that one particular bidder is able to comply with the specifications for municipal work at less expense than other concerns affords no ground for refusing to the municipality the right to obtain the best material or work that skill and ingenuity can produce. *Id.*

3. A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drains, it would not go. *Jerolaman v. Belleville*, 206

4. A municipal corporation may be liable for work done and materials furnished it, by an unauthorized agent, when the contract for such supplies is one that is within the scope of its corporate powers. An agency in such a case may, by implication, be created in fact, by the conduct or acts of the parties, and the contracts of such an agent may, by like conduct and acts of the parties be, by implication, ratified by the municipality. *Frank v. Bd. of Education*, 273

5. The law will not permit a recovery on a *quantum meruit* in a suit against a municipality where an express contract would be *ultra vires* because in violation of chapter 342 of the laws of 1912. *Pamph. L., p. 593. Eckert v. West Orange*, 545

See also ORDINANCES.
PUBLIC WORK.
RAILROADS, 4.

NEGOTIABLE INSTRUMENTS.

Where a promissory note was given in payment for a carload of glass bought and delivered, the fact that the contract for the

Negligence.

glass also included four other carloads which the payee of the note failed to deliver, thereby entailing a loss on the maker of more than the amount of the note, is no defence to a suit on the note by a holder thereof for value in due course where there was no proof that such holder knew of such contract when it took the note. Under such circumstances it is immaterial that such holder did know that the payee "was losing money, was in a bad way, and in danger of going into the hands of a receiver." *People's National Bank v. Cramer*, 655

NEGLIGENCE.

1. Where defendant, while driving an automobile on a public highway, ran into plaintiff's decedent because he was unable to see decedent, owing to his temporary blindness caused by the deflection of light shining on his windshield, and there being no contention that acts of the decedent contributed to his injury, a verdict of the jury, on the trial for damages, resulting in the exoneration of the defendant, cannot be justified, and is set aside. *Hammond v. Morrison*, 15

2. Where it appears from the evidence that the place where an accident happened was a portion of the ferry premises as actually used by a ferry company, and with respect to which, therefore, it was the duty of the company to exercise reasonable care to make the premises safe for the use of its passengers, it is not a defense in an action for damages resulting to a passenger from want of repair that the *locus in quo* was not within the premises demised to the ferry company. *Fortin v. Del., Lack. & W. R. R. Co.*, 137

3. The liability of an inviter is circumscribed by the invitation, and

*Negligence.**Negligence.*

- does not extend to persons invited whose injuries are received while using the premises without the limits of the invitation. *Bonfield v. Blackmore*, 252
4. A mere passive acquiescence by the owner of a building, or his representative, in a certain use of his property, imposes no obligation upon him to keep it in a safe condition for the benefit of the user. *Id.*
 5. Where, at the trial of an action against a railroad company for damages occasioned by the emission of sparks from a locomotive, there was testimony adduced by the defendant company, that the spark arrester of the locomotive which caused the fire was inspected, and found in good order, and there was also testimony that the same engine had set another fire, and an expert further testified that where fires repeatedly occur through sparks escaping from an engine, it is evidence that the engine is not in proper order, the question of negligence of the defendant company was properly submitted to the jury. *Martin v. Lehigh Valley R. R. Co.*, 258
 6. A traffic regulation giving an automobile driver the right of way at a street intersection against a vehicle approaching the crossing at the same time from his left, does not relieve him of the legal duty to use reasonable care to avoid colliding with such vehicle should its driver disregard such right. In case of injury to a passenger on the latter vehicle resulting from such a collision under circumstances indicating a disregard of that legal duty it becomes a jury question whether under all the circumstances, including the traffic regulation, there was negligence on the part of the driver having the right of way. *Erwin v. Traud*, 289
 7. The defendant owning a tract of land, upon which was located a freight shed, filled in the land so as to change its topography, and the direction of the flow of surface water therefrom. Snow having accumulated on the retaining wall of the embankment erected, the water flowed therefrom over the adjacent sidewalk and froze thereon. The plaintiff while walking on the sidewalk slipped, fell and was injured. In an action to recover for the injuries, the trial court charged the jury that unless there was affirmative proof in the case, from which they could infer, that the ice upon the sidewalk was caused by melting snow, which had been transported from another locality, to the defendant's premises, there could be no recovery; and also that the mere presence of piles of snow upon defendant's wall presented no proof that the snow had been carried thereto from another place by the defendant or its agents—*Held*, that the instructions of the court in these particulars were correct. *Lightcap v. Lehigh Valley R. R. Co.*, 620
 8. In a suit against a father and son for damages sustained by reason of the negligent operation, by the son, of an automobile, the admission of alleged hearsay testimony that the ownership of the automobile was in the son, and not in the father, was harmless, where the jury found the son "not guilty" of negligence, since, if the father was the owner of the car and the son was on his father's business, as his agent or servant, at the time of the infliction of the injury, the father would not have incurred any legal responsibility therefor unless it also appeared that the injury was due to the son's negligence and to which the decedent did not in anywise proximately contribute. *Gromer v. George*, 644

*Nonsuit.**Officers.*

See also BRIDGES, 1.

BUILDING AND LOAN
ASSOCIATIONS.

INFANTS, 1, 2.

INSTRUCTIONS TO JURIES,
4.

NEW TRIAL.

See PRACTICE, 9, 10.

NONSUIT.

When a judge is trying a case with a jury, his opinion as to the sufficiency of the plaintiff's proofs, whether communicated to counsel or not, does not deprive the plaintiff of his right to submit to a voluntary nonsuit at any time before the jury has retired to consider its verdict or the judge has commenced to address the jury for the purpose of directing a verdict. *Malone v. Erie R. R. Co.*, 350

NUISANCE.

1. In an action brought to recover damages for a nuisance created and maintained by the defendant in the building of an embankment along a public highway, thereby interfering with plaintiff's full use of the highway, the recovery by the plaintiff must be confined to the damage sustained up to the time of the commencement of the suit, for the reason that since the creation of the obstruction was an illegal act it is not to be assumed that the unlawful condition created was a permanent one, no matter what the character of the obstruction might be. In such a case a prior recovery does not preclude a recovery for damages sustained because of the continuance of the obstruction after the commencement of the prior action. *Dickinson v. Del. Lack. & W. R. R. Co.*, 158.

2. The general rule that a person suffering from a nuisance created by another is under a duty to take proper measures for the lessening of the damages resulting therefrom, is not so far reaching in its effect as to relieve the wrong doer from the responsibility for the existence of such conditions and to impose it upon the innocent sufferer by requiring him to assume that the creator of the nuisance will continue indefinitely to maintain it in violation of law, and, upon this assumption, oblige him to alter or add to the buildings upon his property for the purpose of adapting it to those conditions. *Ib.*

3. In order that an individual may maintain an action for a public nuisance, he must prove that he thereby suffers a particular, direct and substantial injury. Citing 19 E. R. C. 263. *Bouquet v. Hackensack Water Co.*, 203

See also RAILROADS, 2.

OCCUPATION TAX.

An ordinance, imposing an occupation tax, that provides for exemptions that have no rational connection with such occupation, is invalid. *Haddon Heights v. Hunt*, 35

OFFICERS.

1. The fact that a superior officer, in whom the law has vested the authority to try his subordinates upon charges preferred against them, has, on previous occasions, reprimanded or disciplined them for delinquencies in the performance of their duties, does not, *per se*, in the absence of a statutory mandate forbidding it, disqualify such superior officer from trying them on charges duly preferred against them. *Crane v. Jersey City*, 109

Officers.

2. A director of public safety, in a city governed under the provisions of the "Walsh act," has the power, sitting alone, to try a member of the police department on charges preferred against him, where the board of commissioners have, by resolution, and in accordance with the provisions of *Pamph. L. 1915, p. 494*, amending section 4 of *Pamph. L. 1913, p. 836*, conferred upon such director the judicial powers exercised by him. *Ib.*
3. While a municipal office may be abolished by the municipality for economical or beneficial reasons, and the incumbent deprived of his office, although protected by a tenure of office statute, that end cannot be accomplished by a removal from office contrary to the terms of such a statute, when such action leaves the office in existence and only brings about the creation of a vacancy to which another may be appointed. *Cahill v. West Hoboken*, 398
4. Where the incumbent of the office or position of health officer of a city brought a writ of *certiorari* to set aside a decision of the civil service commission, that another person be reinstated to the office or position, and the court of first instance fully considered the relative rights of the two persons, deciding that the incumbent was not entitled to hold the office or position but that his opponent was, and dismissed the writ, and on appeal the appellate court affirmed the judgment of the lower court on the ground that *certiorari* was not the proper remedy, and that the most the incumbent was entitled to was a *mandamus* to the civil service commission to certify his compensation; in a subsequent proceeding to determine the right to the same office, in the same court, the doctrine

Orphans' Court.

of *stare decisis* will be applied, and the right to the office or position will be determined in accordance with the prior decision. *Broune v. Hagen*, 423

See also *BOROUGHs*, 1.

QUO WARRANTO.

ORDINANCES.

By virtue of the act of 1916 (*Pamph. L., p. 525*), an ordinance for the issue of municipal bonds is conclusively presumed to have been duly and regularly passed and to comply with the provisions of the statutes; and its validity cannot be questioned except in a suit, action or proceeding commenced prior to the expiration of the twenty days after the first publication of the statement required by the act. *Held*, in an action commenced after the expiration of the twenty days, that the conclusive presumption applies to a case where the municipality had lawful authority to make the improvement at the time proposed for the issue of the bonds although not at the time of the first publication of the ordinance and that the validity of the ordinance could not be questioned. *Dale v. Bayhead*, 49

See also *RAILROADS*, 6, 7, 8.

ORPHANS' COURT.

1. The Orphans' Court has no jurisdiction to make an order for discovery of assets, upon the petition of an executor of a non-resident decedent, when letters testamentary have not been issued out of such court. *Traut v. Paul*, 62
2. A decree of the Orphans' Court, barring creditors who have failed to present their claims within

Oysters and Clams.

the time limited by a previous order of the court, bars a creditor from any right of action against the executor or administrator, founded upon a claim that might have been presented within the time so limited. *Ray Estate Corp. v. Steelman*, 184

OYSTERS AND CLAMS.

The act of 1846 (*Pamph. L.*, p. 181), entitled "An act for the preservation of clams and oysters," and the proceedings provided therein, has been superseded by the act entitled "An act to provide a uniform procedure for the enforcement of all laws relating to the taking of natural seed oysters and clams and the protection of the natural seed oyster grounds of the state and for the recovery of penalties for the violation thereof" (*Pamph. L.* 1900, p. 425), which provides, among other things, that all proceedings for the recovery of penalties pursuant to the provisions of the act shall be entitled and run in the name of the State of New Jersey, with one of the oyster commissioners or their assistants or a police officer or a constable, and that "no proceedings shall be instituted by any person not a duly commissioned oyster commissioner or their assistants or a police officer or a constable of this state." *Held*, that a judgment rendered in a proceeding instituted by a private person under sections 7 and 9 of the act of 1846 must be set aside. *Bradford v. De Luca*, 434

PARKS.

A city is not required to purchase or condemn land for park purposes under *Pamph. L.* 1894, p. 146, and a writ of *mandamus* will not be allowed when it appears that the cost of purchase or condemnation will re-

Practice.

quire a bond issue beyond the legal limit. *McAllister v. Atlantic City*, 93

PENALTIES.

The legislature may authorize imprisonment for non-payment of penalties imposed for offences that involve injury to the public. *Lowrie v. State Board of Dentistry*, 54

See also DENTISTRY, 1, 2.

POLICE PENSIONS.

See LACHES, 1, 2.

POLICE POWER

See HEALTH, 1.

POOR.

Section 15 of the act of 1911 for the settlement and relief of the poor (*Pamph. L.* 1911, p. 397) prescribes two sets of conditions under which the court may have jurisdiction to compel certain relatives to maintain any poor person, namely: (1) upon complaint of the overseer of the poor where the overseer has made an order for relief and maintenance which the relatives have failed to perform, and (2) upon complaint by two freeholders, where the indigent relative is supported at public expense and the overseer neglects to make the order. Where no order has been made by the overseer and there is no proof that the indigent relative was supported at public expense, the action must fail, since the case is not within either class. *Stark v. Fagan*, 187

PRACTICE.

1. The present practice requires that a defendant's answer must specifically state any defence

Practice.

which, if not stated, would raise issues not arising out of the complaint. *Shaw v. Bender*, 147

2. The Court of Errors and Appeals cannot directly review the order of a single justice of the Supreme Court where he sits as such and not as the court itself. *Van Hoogenstyn v. Del., Lack. & W. R. R. Co.*, 189

3. An appeal under section 25 of the supplement of 1912 to the Practice act cannot be effective until final judgment. *Ib.*

4. The allowance by a justice of the Supreme Court of a *habeas corpus cum causa* to remove an action from the Circuit Court or Common Pleas, rests in his sound discretion and his order denying the writ is not appealable. *Ib.*

5. Where a defendant in an action in the Supreme Court, tried at Circuit, elects to apply for and obtain a rule to show cause why a new trial shall not be granted, and no points are expressly reserved in the rule, he is barred from taking or prosecuting an appeal except upon matters of law arising upon the face of the record. *Hcinz v. Del., Lack. & W. R. R. Co.*, 198

6. On defendant's rule to show cause why a verdict in the Supreme Court should not be set aside as excessive and a new trial granted, that court has power, in the exercise of its discretion, to give the plaintiff the option of accepting a reduced verdict, or being put to a new trial. This power exists not only in actions based upon contracts, but also in actions for unliquidated damages for torts, and when, in such a case, the plaintiff has filed a *remittitur* of so much as the court deemed excessive, and judgment has been

Practice.

entered for the reduced verdict, this court will not review the action taken by the Supreme Court on the appeal of the party in whose favor the reduction was made. *Ib.*

7. Although the appellate court has the power to dismiss an appeal which is manifestly and palpably frivolous and without merit, it will not, as a rule, dismiss on such ground, in the absence of a motion for that purpose, but will affirm the judgment below. *Ib.*

8. Rule 80 of the Supreme Court declares that a frivolous or sham plea may be stricken out, upon proper affidavit in support of a motion for that purpose, unless the defendant by affidavit or other proof shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. Under this rule the finding of the judge must be taken as true until the contrary appears, and this is so when an appeal is taken from such an order as permitted by section 15 of the Practice act of 1912. *Eiselle & King v. Raphael*, 219

9. Under the Practice act (*Pamph. L. 1912, p. 377, § 32*), and rules 72 and 73 annexed, and Supreme Court rules, 1913, Nos. 131, 132 and 219, a judge of the Circuit Court has power to grant a new trial because of inadequate damages awarded by the verdict of a jury, and, under rule No. 122, to impose terms that if the defeated party pays a certain sum within a specified time, the rule to show cause why a new trial should not be granted shall be discharged, otherwise made absolute. *Semble*: that the trial court could impose such terms without the aid of statute or rule of court. *Gaffney v. Illingsworth*, 490

10. The granting of a new trial rests in the sound discretion of the

Privileged Communications.

trial court, and, as it does not settle definitively the rights of the parties, it is not appealable. *Ib.*

PRACTICE ACT.

See MANDAMUS, 2.
PROCESS, 4.

PRINCIPAL AND AGENT.

See BUILDING AND LOAN ASSOCIATIONS.
MUNICIPAL CORPORATIONS [POWERS], 4.

PRINCIPAL AND SURETY.

See CONTRACTS, 11.
INSOLVENT DEBTORS, 4.

PRIVILEGED COMMUNICATIONS.

1. A communication made by a party to an attorney after the latter's employment has terminated, is not privileged, and the attorney may be compelled to disclose the information so acquired. *For v. Forty-Four Cigar Co.*, 483

2. When a party writes a letter to a member of the bar whose relation as counsel to the former had ceased, if, in fact, there ever had been such relationship between them, which letter contained statements tending to prove a fact concerning the question of master and servant, which was pertinent to the issue, the letter is not a privileged communication and is competent evidence against the party writing it. *Ib.*

PROCESS.

1. A return that a summons was served by leaving it at defendant's "residence" is insufficient. *Heilemann v. Clowney*, 87

Public Utilities.

2. A summons is not lawfully served by slipping a copy thereof under the locked entrance door of a building leading into a hall, which is used to communicate both with a business establishment and a stairway to defendant's suite of apartments, shut off by its own entrance door. *Ib.*

3. Whether such summons could be lawfully served by delivery to defendant's son, living with her in said apartment and about to enter the building from the street, *quære.* *Ib.*

4. The abolition of a return day in the summons brought about by the Practice act of 1912, and the requirement that summons shall be served "forthwith" (*Pamph. L. 1912, p. 468*), have done away with the practice of enlarging the return day in cases when prompt service cannot be made or defective service has been made; but have not deprived plaintiffs of the right to have lawful service made on defendants on the same principles that led to an extension of the return day under the former practice. *Ib.*

PUBLIC POLICY.

Upon grounds of public policy, one who actively or passively participates in violating a statute, cannot recover damages for a loss occasioned by such violation; following and applying the doctrine enunciated in *Hetzl v. Wasson Piston Ring Co.*, 89 N. J. L. 205. *Betts v. Mass. Bonding & Ins. Co.*, 632

PUBLIC UTILITIES.

1. Under an act concerning public utilities (*Pamph. L. 1911, p. 374, ch. 195, § 38*) the Supreme Court is given jurisdiction to review the orders of the board of public utility commissioners and to set aside or affirm the orders

Public Work.

in toto, but the Supreme Court has no power under said act, either to revise or modify an order of said board. *Erie R. R. Co. v. Public Utility Board*, 271

2. Where a traction company seeks to withdraw the sale of six tickets for a quarter and charge a straight five-cent fare, such withdrawal is an increase in rate sufficient to give the public utility commission jurisdiction to pass upon the same under section 17, paragraph "h" of the Public Utility act. *Pamph. L. 1911, p. 380. Trenton & Mercer County Tract. Co. v. Trenton*, 378

PUBLIC WORK.

- A municipality cannot lawfully reject the bid of the lowest bidder, where the law requires the awarding of a contract to the lowest responsible bidder, upon the ground that he is not responsible, without giving him a hearing, and a finding that he is not responsible rested upon proper facts. *Kelly v. Freeholders of Essex*, 411

See also ADVERTISING, 1.

QUO WARRANTO.

- One who complains that the incumbent of an office holds the office illegally, can only succeed in a *quo warranto* proceeding to oust the incumbent, by showing that he himself has a legal title thereto. *Flore v. Lanning*, 12

See also ELECTIONS, 5, 6.

RAILROADS.

1. The provision of the General Railroad law (3 *Comp. Stat.*, p. 1910, § 40), requiring that the clerk of the Supreme Court be carried free of charge, is uncon-

Railroads.

stitutional as to any railroad company that is under no contract obligation to perform that duty. *Penna. R. R. Co. v. Gebhardt*, 36

2. There is nothing in section 30 of the Railroad act (*Pamph. L. 1903, p. 661*) which permits a railroad company and a municipality to agree that the former shall erect and maintain a nuisance in a public highway. *Dickinson v. Del., Lack. & W. R. R. Co.*, 158
3. The provisions of both chapter 35 and chapter 96 of the laws of 1909 are applicable to cases at railroad grade crossings which are provided with safety gates, or other devices for the warning of travelers. *Kratz v. Del., Lack. & W. R. R. Co.*, 210
4. The right of a municipality to contract with a railroad company for an alteration of street grades to change a grade crossing, under the provisions of section 30 of the General Railroad law (*Comp. Stat.*, p. 4234), is paramount to the provisions of the Road act of 1858 (*Comp. Stat.*, p. 4461) and supersedes it; and in cases where a change of grade in a street is made by a municipality thereunder, the consent of a majority of owners in interest, fronting on the street, is not required. Therefore, where the municipality proceeds under section 30 of the General Railroad law, to change the grade of a street, sections 70 and 73 of the Road act are not applicable, and any damage sustained by the landowners, by reason of such change, must be assessed as provided by the statute. *Caruso v. Montclair*, 255
5. The owner of a house, which was set on fire by sparks emitted from a locomotive engine of the defendant company, received a sum of money, from an insurance company, giving the latter a

*Railroads.**Release.*

subrogation receipt. He then brought an action against the railroad company for the entire loss, which was settled by payment of the total loss, less a certain sum, fixed as the amount paid by the insurance company. The insurance company subsequently brought an action against the railroad company to recover the amount paid by it upon the insurance policy, and the railroad company asked for a nonsuit, because it appeared that another action had been begun and determined for the same loss. *Held*, that the former action and settlement thereof was not a bar to the action by the insurance company. *Martin v. Lehigh Valley R. R. Co.*, 258

6. The word "each" in an ordinance of Jersey City, providing for compensation to be paid the city, for the use of land privileges by a railroad company, in connection with its three routes, depending upon the amount of fare for each single passenger service, means any route and not all three routes. *Jersey City v. Hudson & Manhattan R. R. Co.*, 640

7. Where an ordinance by its terms does not constitute a contract with a railroad company, for the use of land privileges, but does provide an option, the railroad company cannot retain the use of the privileges and refuse to pay the stipulated compensation. *Ib.*

8. A continued exercise of the privileges by a railroad company, under an ordinance accepted by it, evinces an election to pay the stipulated compensation and thereby creates a legal obligation to pay. The language of the ordinance construed will be found in the opinion. *Ib.*

See also LIMITATION OF ACTIONS, 1. NEGLIGENCE, 5.

RECEIVERS.

The defendants agreed in writing, to produce from their respective farms, tomatoes, of a given quality, by a certain time, and deliver same to the vendee, and before the period of delivery mentioned in the contract the vendee was declared insolvent, and receivers were appointed therefor. In a suit by the receivers to collect a claim against the defendants for fertilizer, which claims were certain in amounts and admittedly correct, the defendants set up by way of set-off their unliquidated demands against the insolvent company, for failure to receive the tomatoes. *Held*, (1) that being unliquidated the demands were not capable of set-off under the Corporation act, which accords the right of set-off only to claims arising out of mutual dealings; (2) the defendants had not perfected their right to sue because of failure to deliver or a tender of delivery; (3) the recognition of unliquidated claims not entitled to any legal preference against the receivers, would accord to such claims a preference in the distribution of the assets of the insolvent company, contrary to the provisions and spirit of the Insolvent act. *More v. Richards*, 626

RECEIVING STOLEN GOODS.

The receipt of money which has been unlawfully or fraudulently obtained from another person, the receiver thereof knowing it to have been so obtained, is within the purview of section 166 of the Crimes act, as amended by *Pamph. L. 1906, p. 431*, relating to the receiving of stolen goods. *State v. Johnson*, 21

RELEASE.

The presumption of payment or release arising from lapse of time

*Res Adjudicata.**Sales.*

is not necessarily a conclusive and absolute presumption. The lapse of time gives rise to a conclusive and absolute presumption only when not satisfactorily accounted for or explained. But when so accounted for or explained the delay still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined in connection with the other evidence. *Christy v. N. Y. Cent. & Hudson R. R. Co.*, 540

RES ADJUDICATA.

1. A suit in the District Court between the same parties, to recover a balance due under a contract, is not *res adjudicata*, in a suit to recover for damages exceeding \$500, on a bond against the surety of the contract. *Meyer v. National Surety Co.*, 128
2. Where one party recovers judgment against another and the defeated litigant commences suit against his adversary for damages for an alleged conspiracy, and the procuring of false testimony to be given, in the very suit in which the recovery was had, these matters, having been available as defenses in the suit and on rule to show cause why a new trial should not be granted, cannot be made the basis of recovery—the doctrine of *res adjudicata* being applicable. *McMichael v. Horay*, 142
3. When, in an action for damages, the fundamental question involved was whether or not a structure, maintained by the defendant, was a nuisance, and the question was resolved in favor of the plaintiff, the matter is *res judicata* between the parties in all subsequent litigation arising out of the maintenance of the structure. *Dickinson v. Del., Lack. & W. R. R. Co.*, 158

RIPARIAN OWNERS.

A riparian owner on a navigable stream suffers no peculiar injury as such because the stream has been made less pleasant for boating, fishing, and bathing. The injury to him is the same as that to any other member of the public, and for the reason that his right *qua* riparian owner is that of access, and not a special right to use the stream in any different manner than others may use it. *Bouquet v. Hackensack Water Co.*, 203

ROADS.

Chapter 122 of the laws of 1914 (*Pamph. L.*, p. 203) is not a grant of power to reconstruct county roads in the broad sense of the term "reconstruction," but is limited to the "reconstruction contemplated under the provisions of an act entitled 'An act to provide for the permanent improvement and maintenance of public roads in this state (Revision of 1912), approved April 15th, 1912.'" *Pamph. L.*, p. 809. *Godfrey v. Freeholders of Atlantic*, 517

See also RAILROADS, 4.

SALES.

Plaintiff relying on representations of defendant's agent that its product called "crude fish" was a good fertilizer for his intended crop of sweet corn, gave an order for "crude fish" and used what he received in response to such order in the belief that it was "crude fish." The crop failed, and he sued for damages. *Held*, (a) that there was evidence of implied warranty that the fertilizer supplied was "crude fish;" (b) that on this point evidence of the statements to plaintiff by the general manager of defendant was competent; (c) that plaintiff's oral testimony as to the receipts and expenses of growing,

*Schools.**Statutes.*

reaping and marketing his crop was competent, whether or not he kept books of account and without their production on his own case. See 89 N. J. L. 12. *Stuart v. Burlington County Farmers' Exchange*, 584

SCHOOLS.

1. Under section 10 of the School law (*Comp. Stat.*, p. 4727) the commissioner of education has jurisdiction in controversies involving the removal, by a local board, of a person from a position existing under the School law. *Schwarzrock v. Bd. of Education of Bayonne*, 370
2. The hearing by the commissioner of education in any controversy or dispute of which he has jurisdiction by virtue of the provisions of section 10 of the School law, is a new hearing, and he is not limited to a mere review of evidence taken before the local board. *Ib.*
3. The action of the state board of education in setting aside the removal of a person from a position existing under the School law, has the effect of a judgment, and a *mandamus* will issue thereon in a proper case, commanding the payment of the salary due such person. Such a case is presented when it appears that he has always been ready and willing to perform his duties and that there are funds in hand applicable to the payment of the amount due him. *Ib.*

SET OFF AND COUNTER-CLAIM.

See RECEIVERS.

SEWERS.

See HEALTH, 1, 2.
ORDINANCES.

SIDEWALKS.

See TAXES AND ASSESSMENTS, 11.

STATUTES:

1. Where words used in a statute have been interpreted by the Supreme Court of the state more than two years before the passage of the act, the words so used must be assumed to have been used with the judicial definition in mind. *American Woolen Co. v. Edwards*, 69
2. In the absence of an express intent to repeal, or of a legislative intent to deal *de novo* with the entire subject, evinced by the existence of incongruous enactments, demonstrating *ex necessitate* the legislative purpose to supersede existing legislation by the later law, a repeal by implication is not favored. *Irwin v. Atlantic City*, 99

STATUTES OF NEW JERSEY CITED.**Boroughs.**

<i>Pamph. L.</i> 1897, p. 310,	214
<i>Pamph. L.</i> 1900, p. 402,	214
<i>Comp. Stat.</i> , p. 230,	13
<i>Comp. Stat.</i> , p. 244, § 33,	383
<i>Comp. Stat.</i> , p. 258, § 50,	395
<i>Comp. Stat.</i> , p. 259, § 52,	214
<i>Comp. Stat.</i> , p. 273, § 90,	50
<i>Comp. Stat.</i> , p. 275, § 92,	395

Bridges.

<i>Comp. Stat.</i> , p. 304, § 9,	619
-----------------------------------	-----

Cemeteries.

<i>Pamph. L.</i> 1883, p. 123,	429
<i>Pamph. L.</i> 1889, p. 418,	429
<i>Comp. Stat.</i> , p. 370,	428

Chancery.

<i>Comp. Stat.</i> , p. 452, § 113a,	500
--------------------------------------	-----

Chosen Freeholders.

<i>Pamph. L.</i> 1900, p. 204,	320
<i>Pamph. L.</i> 1912, p. 619,	320

<i>Statutes of N. J.</i>		<i>Statutes of N. J.</i>	
Cities.		Ejectment.	
<i>Pamph. L.</i> 1897, p. 46,	107	<i>Comp. Stat.</i> , p. 2056, ¶	
<i>Pamph. L.</i> 1902, p. 284,		13,	654
	100, 549	Elections.	
Clams and Oysters.		<i>Rev. Supp.</i> , p. 277,	296
<i>Pamph. L.</i> 1846, p. 181,	435	<i>Pamph. L.</i> 1880, p. 229,	296
<i>Pamph. L.</i> 1900, p. 425,	437	<i>Gen. Stat.</i> , p. 1327, § 195,	296
Commission Government.		<i>Gen. Stat.</i> , p. 1367, § 369,	296
<i>Pamph. L.</i> 1911, p. 462,		<i>Pamph. L.</i> 1898, p. 237, §	
45, 108,	512	159,	296
<i>Pamph. L.</i> 1913, p. 836, §		<i>Pamph. L.</i> 1909, p. 41,	296
4,	112	<i>Comp. Stat.</i> , p. 2073, §	
<i>Pamph. L.</i> 1914, p. 253,	45	159,	296
<i>Pamph. L.</i> 1915, p. 494,	112	<i>Pamph. L.</i> 1911, p. 317,	
<i>Pamph. L.</i> 1916, p. 216,	515	§ 58,	68
Contempt.		<i>Pamph. L.</i> 1912, p. 912,	300
<i>Comp. Stat.</i> , p. 1736, §		<i>Pamph. L.</i> 1914, p. 170,	512
138,	494	Eminent Domain.	
Corporations.		<i>Comp. Stat.</i> , p. 2181,	83
<i>Comp. Stat.</i> , p. 1620, pl.		<i>Comp. Stat.</i> , p. 2184, §	
31a,	71	6,	469
<i>Comp. Stat.</i> , p. 1652, §		Executions.	
86,	628	<i>Pamph. L.</i> 1915, p. 182,	392
Crimes.		Fire and Police.	
<i>Rev. of</i> 1874, p. 253, §		<i>Comp. Stat.</i> , p. 2446, pl.	
147,	23	459,	66
<i>Pamph. L.</i> 1898, p. 839,		<i>Pamph. L.</i> 1915, p. 688,	400
§ 166,	23	Food and Drugs.	
<i>Pamph. L.</i> 1906, p. 431,	21	<i>Pamph. L.</i> 1901, p. 186,	
Criminal Procedure.		§ 16,	449
<i>Pamph. L.</i> 1848, p. 226,	265	<i>Pamph. L.</i> 1907, p. 485,	449
<i>Pamph. L.</i> 1863, p. 311,	266	<i>Comp. Stat.</i> , p. 2574, § 40,	449
<i>Comp. Stat.</i> , p. 1836, §		<i>Pamph. L.</i> 1915, p. 663,	449
50,	23	Garbage and Ashes.	
<i>Comp. Stat.</i> , p. 1863, §		<i>Pamph. L.</i> 1902, p. 200,	549
136,	391	Grade Crossings.	
Dentistry.		<i>Pamph. L.</i> 1913, p. 91,	432
<i>Comp. Stat.</i> , p. 1911, § 1,	636	Habeas Corpus.	
<i>Pamph. L.</i> 1915, p. 261,	54	<i>Comp. Stat.</i> , p. 2651,	190
Disorderly Persons.		Insolvent Debtors.	
<i>Pamph. L.</i> 1913, p. 103,	60	<i>Comp. Stat.</i> , p. 2824,	153
District Courts.		Insurance.	
<i>Comp. Stat.</i> , p. 1966, §		<i>Pamph. L.</i> 1907, p. 133,	
45,	90	§ 1 (4),	648
<i>Comp. Stat.</i> , p. 1999, §		Intoxicating Liquors.	
149,	239	<i>Pamph. L.</i> 1913, p. 574,	97
<i>Comp. Stat.</i> , p. 2017, §			
213,	682		

<i>Statutes of N. J.</i>	<i>Statutes of N. J.</i>
Justices' Court. <i>Pamph. L.</i> 1903, p. 251, 449 § 80, 449 <i>Pamph. L.</i> 1904, p. 72, § 80, 449 <i>Comp. Stat.</i> , p. 2985, § 16, 90	<i>Comp. Stat.</i> , p. 4122, § 225, 48 <i>Pamph. L.</i> 1912, p. 377, § 27, 30 <i>Pamph. L.</i> 1912, p. 377, § 32, 490 <i>Pamph. L.</i> 1912, p. 380, § 15, 220 <i>Pamph. L.</i> 1912, p. 382, § 25, 190 <i>Pamph. L.</i> 1912, p. 397, rule 83, 199 <i>Pamph. L.</i> 1912, p. 468, 88
Mechanics' Lien. <i>Pamph. L.</i> 1912, p. 470, § 23, 92	Quo. Warranto. <i>Comp. Stat.</i> , p. 4212, § 4, 425 <i>Comp. Stat.</i> , p. 4214, § 12, 425
Motor Vehicles. <i>Pamph. L.</i> 1916, p. 283, 99	Public Utilities. <i>Pamph. L.</i> 1911, p. 374, § 38, 271 <i>Pamph. L.</i> 1911, p. 380, § 17 "h," 379 <i>Pamph. L.</i> 1911, p. 383, § 21, 534
Municipal Corporations. <i>Pamph. L.</i> 1912, p. 593, 475, 547 <i>Pamph. L.</i> 1916, p. 525, 131 <i>Pamph. L.</i> 1916, p. 525, § 2, 50	Railroads and Canals. <i>Rev. of 1874</i> , p. 944, § 163, 257 <i>Pamph. L.</i> 1901, p. 116, 257 <i>Pamph. L.</i> 1903, p. 674, § 58, 544 <i>Comp. Stat.</i> , p. 4234, § 30, 257, 344 <i>Comp. Stat.</i> , p. 4235, § 32, 534 <i>Comp. Stat.</i> , p. 4240, § 40, 36 <i>Comp. Stat.</i> , p. 4246, § 58, 260 <i>Pamph. L.</i> 1912, p. 265, 260 <i>Pamph. L.</i> 1914, p. 358, 36 <i>Pamph. L.</i> 1915, p. 98, 344
Newspapers. <i>Comp. Stat.</i> , p. 3762, 475	Roads. <i>Comp. Stat.</i> , p. 4461, § 70, 256 <i>Comp. Stat.</i> , p. 4461, § 73, 256 <i>Pamph. L.</i> 1912, p. 809, 320, 517 <i>Pamph. L.</i> 1914, p. 203, 517
Orphans' Court. <i>Comp. Stat.</i> , p. 3834, § 60, 185 <i>Comp. Stat.</i> , p. 3866, pl. 139a, 63	Sales of Goods. <i>Comp. Stat.</i> , p. 4650, § 15, 586
Poor. 2 Nevill 227, 187 <i>Comp. Stat.</i> , p. 4023, § 30, 187 <i>Pamph. L.</i> 1911, p. 397, § 15, 187	
Parks. <i>Pamph. L.</i> 1894, p. 146, 93	
Practice. <i>Pat. L.</i> , p. 245, 264 <i>Pat. L.</i> , p. 258, 191 <i>Pat. L.</i> , p. 364, 191 <i>Pamph. L.</i> 1838, p. 61, § 8, 191 <i>Rev. Stat.</i> , p. 201, § 7, 192 <i>Rev. Stat.</i> , p. 941, §§ 86-90, 192 <i>Comp. Stat.</i> , p. 4059, § 28, 572 <i>Comp. Stat.</i> , p. 4067, § 52, 87 <i>Comp. Stat.</i> , p. 4112, § 198, 192	

<i>Statutes of N. J.</i>		<i>Statutes of N. J.</i>	
Schools.		<i>Comp. Stat.</i> , p. 5287, § 74	
<i>Comp. Stat.</i> , p. 4727, § 10,	370	502,	74
<i>Comp. Stat.</i> , p. 4740,	277	<i>Comp. Stat.</i> , p. 5287, § 503,	73
		<i>Comp. Stat.</i> , p. 5288, § 504,	72
Statutes.		<i>Comp. Stat.</i> , p. 5291, § 505,	71, 294
<i>Comp. Stat.</i> , p. 4973, pl. 10,	42	<i>Comp. Stat.</i> , p. 5293, § 510,	71
Street Railways.		<i>Comp. Stat.</i> , p. 5295, § 519,	73
<i>Comp. Stat.</i> , p. 5021,	84	<i>Comp. Stat.</i> , p. 5299, § 531,	538
Succession Tax.		<i>Pamph. L.</i> 1914, p. 141,	171
<i>Pamph. L.</i> 1909, p. 325,		<i>Pamph. L.</i> 1914, p. 353,	59
559, 707		<i>Pamph. L.</i> 1916, p. 25,	72
<i>Comp. Stat.</i> , p. 5301, § 3,	579	Timber.	
<i>Pamph. L.</i> 1914, p. 267,		<i>Pat. L.</i> , p. 49,	11
559, 579, 707		<i>Penn. L.</i> , p. 700,	10
Taxes and Assessments.		<i>Comp. Stat.</i> , p. 5396,	9
<i>Pamph. L.</i> 1854, p. 429,	408	Towns.	
<i>Pamph. L.</i> 1863, p. 497,	408	<i>Pamph. L.</i> 1895, p. 218,	2
<i>Pamph. L.</i> 1866, p. 1078,	164	<i>Pamph. L.</i> 1906, p. 324,	547
<i>Pamph. L.</i> 1879, p. 298,	417	<i>Pamph. L.</i> 1907, p. 409,	132
<i>Pamph. L.</i> 1884, p. 282,	366	<i>Comp. Stat.</i> , p. 5427, § 39,	132
<i>Pamph. L.</i> 1888, p. 372,	408	<i>Comp. Stat.</i> , p. 5518,	133
<i>Pamph. L.</i> 1900, p. 503,	538	<i>Comp. Stat.</i> , p. 5532, § 375,	400
<i>Pamph. L.</i> 1901, p. 31,	366	<i>Comp. Stat.</i> , p. 5533, § 378,	547
<i>Pamph. L.</i> 1902, p. 447,	417	<i>Pamph. L.</i> 1911, p. 531,	131
<i>Pamph. L.</i> 1903, p. 232,		<i>Pamph. L.</i> 1912, p. 358,	2
354, 538		<i>Pamph. L.</i> 1914, p. 91,	548
<i>Pamph. L.</i> 1903, p. 436,	409	Townships.	
<i>Pamph. L.</i> 1903, p. 446,	417	<i>Comp. Stat.</i> , p. 5582, § 27,	68
<i>Pamph. L.</i> 1906, p. 31,		<i>Comp. Stat.</i> , p. 5609, § 93,	346
377, 728		Usury.	
<i>Pamph. L.</i> 1906, p. 644,	354	<i>Comp. Stat.</i> , p. 5706, § 5,	41
<i>Comp. Stat.</i> , p. 5075,	408	Water Supply.	
<i>Comp. Stat.</i> , p. 5083, § 3,		<i>Pamph. L.</i> 1907, p. 633,	471
6,	163	<i>Pamph. L.</i> 1915, p. 426,	470
<i>Comp. Stat.</i> , p. 5084, § 4d,	692	<i>Pamph. L.</i> 1916, p. 128,	471
<i>Comp. Stat.</i> , p. 5085, § 5,	53	Wills.	
<i>Comp. Stat.</i> , p. 5107, § 28,	52	<i>Comp. Stat.</i> , p. 5873, § 36,	608
<i>Comp. Stat.</i> , p. 5121, § 38,	58		
<i>Comp. Stat.</i> , p. 5124, § 39,	53, 58		
<i>Comp. Stat.</i> , p. 5134, § 50,	416		
<i>Comp. Stat.</i> , p. 5141, § 66,	417		
<i>Comp. Stat.</i> , p. 5171, § 191,	213		
<i>Comp. Stat.</i> , p. 5286,	366		

*Street Railways.**Succession Tax.***Workmen's Compensation.**

- Pamph. L.* 1911, p. 134, 454, 553, 658
Pamph. L. 1911, p. 134, ¶ 12, 444
Pamph. L. 1911, p. 134, ¶ 18, 666
Pamph. L. 1911, p. 143, ¶ 21, 114, 447
Pamph. L. 1913, p. 230, 454
Pamph. L. 1913, p. 302, 422, 441, 553, 658
Pamph. L. 1913, p. 302, ¶ 11, 554
Pamph. L. 1913, p. 302, ¶ 12, 444
Pamph. L. 1913, p. 302, ¶ 20, 442, 666

STREET RAILWAYS.

1. Under the Street Railway act of 1893 (*Comp. Stat.*, p. 5021), the necessity for the taking of lands exists when it appears that they are required for a route lawfully filed, and otherwise complying with the statute. *Rowland v. Mercer County Traction Co.*, 82
2. The fact that the taking is in pursuance of a general project, involving with the creation of new highways in a municipality the removal of a railroad terminal and trolley terminal, so as to connect detached sections of a university campus, does not deprive the improvement of its public character. *Ib.*
3. The change of a trolley terminus to a new site, and its connection with the existing line at a convenient point, involves the building of a new line in a sense covered by sections 6 and 13 of the Street Railway act of 1893. *Ib.*
4. In order to construct a street railway from terminus to terminus as authorized by the municipal ordinance, it was necessary to cross a steam railroad; the consent of the railroad company to the crossing could not be had

and efforts by the street railway company to secure an order of the Chancellor and the approval of the public utility commission were without result. *Held*, that in the absence of a legal right to cross the steam railroad a *mandamus* should not be awarded to compel the construction of the street railway. *Hamilton Twp. v. Mercer County Traction Co.*, 531

5. A municipal ordinance authorized the construction of a street railroad from terminus to terminus. *Held*, that a *mandamus* should not be awarded to compel its construction in two unconnected sections, separated by a steam railroad, which the street railway had no legal right to cross. *Ib.*

See also **CONTRACTS**, 4, 5, 6.
PUBLIC UTILITIES, 2.

STOCKHOLDERS.

See **CORPORATIONS**, 1.

SUCCESSION TAX.

1. The interest of a non-resident deceased pledgor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the act of 1909 (*Pamph. L.*, p. 325; *Comp. Stat.*, p. 5301), as amended in 1914. *Pamph. L.*, p. 267. *Security Trust Co. v. Edwards*, 558
2. Under section 3 of the Succession Tax act of 1909 (*Comp. Stat.*, p. 5301) where there are contingent or executory interests dependent upon a power of appointment, the appraisal and taxation thereof is suspended until the exercise of the power. *Security Trust Co. v. Edwards*, 579

*Taxes and Assessments.**Taxes and Assessments.***SUMMARY CONVICTION.**

See **APPEAL AND ERROR**, 7.

TAXES AND ASSESSMENTS.

1. A taxpayer, on May 20th, owned household goods, jewelry, promissory notes, and deposits in bank, and was assessed for personalty at the value of the household goods only; the county board of taxation subsequently assessed the jewelry, promissory notes and deposits in bank as omitted property. *Held*, that this was correct, and that the county board was not bound to take the proceedings required in the case of undervalued property. *Fidelity Trust Co. v. Essex Bd. of Taxation*, 51
2. Where it is discovered after the owner's death that personal property has been omitted from taxation, it is a sufficient compliance with the statute to give notice of the assessment of the omitted property to the executor, who is then the owner. *Ib.*
3. Where an owner dies after May 20th, and property omitted is subsequently assessed, it should be assessed in the name of the owner on May 20th, not in the name of his executor. *Ib.*
4. Under section 39 of the Tax act (*Comp. Stat.*, p. 5124), an assessment for taxation cannot be set aside for irregularity or defect in form or illegality in assessing, laying or levying the tax, if, in fact, the person so assessed is liable to taxation in respect of the purpose for which the tax is levied. *Musconetcong Iron Works v. Netcong*, 58
5. An assessment of taxes cannot be set aside on *certiorari* on the ground that the aggregate amount of money levied or assessed in any taxing district for taxes is greater than called for by the law or resolution granting it. *Comp. Stat.*, pp. 5121-5122. *Ib.*
6. A grant of exemption from taxation, even though made in respect to some particular property, is a personal privilege conferred upon the grantee, and the immunity thereby granted does not pass to a purchaser of the property, in the absence of an indication by the legislature, so clear and unmistakable as to leave no doubt of its purpose that it shall so pass. *Mausoleum Builders v. State Bd. of Taxes, &c.*, 163
7. Neither the language nor the history of section 3, paragraph 6, of the General Tax act of 1903 (*Comp. Stat.*, p. 5083), which exempts "graveyards not exceeding ten acres of ground, cemeteries and buildings for cemetery use erected thereon," suggests that in passing it the legislature intended to confer immunity from taxation upon business corporations that should see fit to devote a part of their capital to the erection of mausoleums for purely commercial reasons and in the hope of making a profit out of the transaction. *Ib.*
8. A county board of taxation having made an assessment of the stock of a bank as required by the act for the taxation of bank stock (*Pamph. L.* 1914, p. 141), a claim for a deduction therefrom of the value of certain shares of stock in other banks taxable elsewhere was properly denied. *Peoples Bank & Trust Co. v. Passaic County Bd. of Taxation*, 171
9. Double taxation is avoided under section 4 of the act not by excluding personal property of the bank that is taxable elsewhere from entering into the assessed value of its stock, but by providing that such assessment shall render such property immune from further taxation to the ex-

*Taxes and Assessments.**Taxes and Assessments.*

- tent that its value has entered into such assessment. *Ib.*
10. The act of 1881 (*Pamph. L.*, p. 194; *Comp. Stat.*, p. 5171), providing for reassessment under direction of the Supreme Court when the original assessment is set aside on *certiorari* for defects in the proceedings, is applicable in all cases where a valid assessment could have been made at the time it was attempted, or could be made at the time of pronouncing judgment on a *certiorari* of the defective assessment. *Phillips v. Longport*, 212
11. The interest, which a landowner must pay on the amount of his assessment for sidewalk improvements, does not begin to run until the amount of such assessment has been definitely ascertained. *Newark Homebuilders Co. v. Bernards Twp.*, 361
12. Where there is nothing that in a legal sense implies the permanent devotion of a telephone company's property to a public use, an assessment for improvements may be measured by the increase in the market value of the land, and it is not limited to the benefit conferred on the company for its use of the property. It is only where land is acquired under a legislative sanction that implies its permanent devotion to a public use that such land has, in legal contemplation, no market value for any other purpose, and hence no market value to be enhanced. *N. Y. Tel. Co. v. Newark*, 362
13. An assessment by commissioners of a borough, which included assessments for laying out and opening a new street and the improving of such street, as well as the cost of sidewalk construction, will be set aside, since separate assessments of damages or benefits for each improvement should have been made under section 33 of the Borough act. *Comp. Stat.*, p. 244. *Whitaker v. Dumont*, 383
14. Under the act entitled "An act for the assessment and collection of taxes" (*Pamph. L.* 1903, p. 394) there is no limitation as to the lien of a tax assessed on lands against the owner, at least so long as he continues to be the owner, and a taxing district has, in such case, the right to enforce the payment of taxes assessed against the owner although the sale is not made, or attempted to be made, within two years of the twentieth day of December of the year for which the taxes are assessed. *Horner v. Margate City*, 406
15. Where lands have been sold by the proper officer to make taxes in arrears levied against land under the provisions of section 53 of the act of 1903 (*Comp. Stat.*, p. 5134), it is lawful to add to the taxes in arrears for the current year, to make which a sale has been ordered, all arrears of taxes for which the land has been sold and purchased by the taxing district to the extent necessary to pay the cost of redemption, whether the taxes accrued prior to the date when the act of 1903 went into effect or thereafter. *Martin v. Woodbridge*, 414
16. The fact that the township clerk in furnishing the collector with a statement of all taxes in arrears erroneously included an installment of a sewer assessment not yet due, will not vitiate the sale when it appears that the collector before making the sale corrected the error by deducting the installment and did not include it in the amount for which the sale was made, nor will the fact that the clerk included in the amount certain costs not properly chargeable make the sale illegal if in fact the sum for which the land was sold was

Timber.

not more, excluding the fees, than the true amount due. *Ib.*

17. Proof by the collector making the sale that he posted advertisements thereof in five of the most public places of the taxing district, is not overcome by the fact that two of the places were sometimes closed during business hours. *Ib.*

18. It is not necessary that the notice of sale for unpaid taxes put up by the collector shall contain a statement that the land will be sold in fee if no one should bid for a shorter term. The statute makes it the duty of the officer to make the sale in fee if no one shall bid for a shorter term, and it is not necessary to advertise the terms of the statute. *Ib.*

19. The fundamental rule, pervading all exemptions from the general tax burden of the state, is that they are not favored by the law unless the statute invoked to support them expresses the legislative intention in clear and unmistakable terms. *Fairview Heights Cemetery Co. v. Fay.* 427

See also FRANCHISE TAX.

TIMBER.

Under a proper construction of the Timber act (*Comp. Stat.*, p. 5396), a plaintiff in an action for a violation of the provisions of that act is limited in his recovery to the actual loss sustained by him if the wrongful acts complained of have been committed by the defendant under an honest belief that he was cutting timber upon his own property, and the question of whether or not defendant has such belief is a question for the determination of the jury. *Cook v. Bennett Gravel Co.*, 9

*Townships.***TOWNS.**

1. The Town of West Hoboken under *Pamph. L.* 1911, p. 531, ch. 250, has no authority to build a town hall. *Syms v. West Hoboken*, 130

2. The words in that statute, "other municipal purposes," under the rule of construction known as *ejusdem generis*, refers to buildings of the same class or of the same general character as those enumerated in the statute. *Ib.*

See also GARBAGE AND ASHES, 1, 2.

TOWNSHIPS.

Section 27 of the Township act (*Comp. Stat.*, p. 5582) enacts that at the annual election at which appropriations for township purposes are voted upon, a majority of all votes cast shall be required to determine the amount of money to be raised for such purposes. At an election held for that purpose, votes were cast for two different amounts for each specified object, and neither amount, taken by itself, had either a majority of the voters who voted at the election, or a majority of the votes cast on the question of appropriations. *Held*, that the method of determining which sum was adopted, is to add all the affirmative and negative votes on both propositions to find the total vote, and, as no sum received a majority, if only the affirmative votes for each proposition are considered, yet, as it is clear that all who voted for the larger sum voted for the smaller sum and something more, the two affirmative votes should be added together and counted for the smaller sum. *Woodbridge v. Keys*, 67

TRAFFIC.

See NEGLIGENCE, 6.

*Trial.**Trial.*

TRIAL.

1. Where a defendant was indicted for assault and battery, as well as for abortion, upon the same female, testimony as to an alleged rape committed upon the female was clearly competent in proving the former offence. *State v. Riccio*, 25
2. Where the court erroneously charged the jury as to the duty to convict the defendant, if the jury found by the weight of the evidence that he did the thing named in the statute under which he was indicted, and subsequently corrected the charge, so that the jury were, in substance, told that they could only convict in case the weight of the evidence was so preponderating as to satisfy them upon that point beyond a reasonable doubt, the initial error in the charge was thereby cured. *Id.*
3. Although certain sentences in a charge, taken alone, need some amplification to render them accurate, yet if such amplification be given in the context, so that the jury cannot be misled, there is no error justifying reversal. *State v. Frank*, 78
4. Upon trial of an indictment, where the defendant fails to testify in his own behalf to deny inculpatory facts, which if false he must know to be so, it is proper for the trial judge to call attention to his failure to testify. *Id.*
5. Conflicting testimony is always for the jury. *Shaw v. Bender*, 147
6. Where in a suit for compensation under a building contract which provides for the completion of the building at a specified time, and that for every day's delay in completion the contractor shall pay the owner \$15 as liquidated damages, and the contract also provides that there shall be no extension of time unless (1) the delay is caused by the neglect or default of the owner, and unless (2) a written claim for extension is presented to the architect within forty-eight hours after the occurrence of the cause, and it appears on trial that performance was delayed, then the burden of proving that the delay was caused by the owner and that such claim for an extension was made, is upon the contractor. *Ferber Cons. Co. v. Hasbrouck Heights*, 193
7. Evidence legal for some purpose cannot be excluded because a jury may erroneously use it for another purpose. The opposite party's protection against this is to ask for cautionary instruction. *Jerolaman v. Belleville*, 206
8. On an issue of fact, tried by a court and jury, where there is testimony on both sides of a controverted fact, it is not error for the trial court to submit the question at issue to the jury for determination. *Jackson v. Dilks*, 280
9. In passing upon a motion for the direction of a verdict, the court cannot weigh the evidence, but is bound to concede to be true all evidence which supports the view of the party against whom the motion is made, and to give to him the benefit of all legitimate inferences which are to be drawn in his favor. *Hoff v. Public Service Ry. Co.*, 386
10. It is for the jury to say what weight shall be given to the testimony of a witness, having an opportunity to hear, standing at or near the crossing where the accident occurred, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, in a grade crossing accident case. *Materka v. Erie R. R. Co.*, 457

Water Supply.

11. It was not error in this case to refuse to direct a verdict in favor of the defendant on the ground that there was no proof of negligence on the part of the defendant, or because the decedent was guilty of contributory negligence. They were both jury questions. *Holmes v. Pennsylvania Railroad Co.*, 74 N. J. L. 469; *Weiss v. Central Railroad Co.*, 76 Id. 348; *Howe v. Northern Railroad Co.*, 78 Id. 683, distinguished. *Ib.*

See also **BROKERS**, 2.
CRIMINAL PROCEDURE, 1.
INSTRUCTIONS TO JURIES,
 1, 2.
NEGLIGENCE, 1.

USURY.

See **BROKERS**, 1.

WARRANTY.

See **SALES**.

WATER SUPPLY.

Upon an application by the District Board of Water-Supply Commissioners, under the act of 1916, page 129, to the Board of Conservation and Development, created by the act of 1915, page 426, for its approval and consent to the diversion of water for an additional water-supply to the cities of Newark and Paterson, the Board of Conservation and Development has power to attach reasonable terms and conditions to its approval and consent, which are germane to the subject-matter. For such terms and conditions, in this case, see this opinion. *Society, &c., v. Bd. Conservation and Development*. 469

WATER COURSES.

See **MUNICIPAL CORPORATIONS** [POWERS], 3.

Workmen's Compensation.**WILLS.**

See **DESCENT**.

WORDS AND PHRASES.

"Any,"	299
"At,"	89
"Consignee,"	76
"Each,"	649
"Emergency,"	278
"Every,"	299
"Interest,"	567
"Person,"	374
"Property,"	567

WORKMEN'S COMPENSATION.

1. Where, in a suit brought under the Workmen's Compensation act, an award is made, based on a finding of total disability, and it appears that a year and a half after the award the petitioner's earning capacity had been fully restored, it was erroneous for the Court of Common Pleas to refuse an order modifying the original award, as provided by section 21 of the act. *Pamph. L. 1911, p. 143. Safety Insulated Wire & Cable Co. v. Common Pleas of Hudson*, 114
2. The basic principle of the Workmen's Compensation act is indemnity. Therefore, when it appears, in a case where an award has been made, that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court, upon proper application, to interfere and grant relief. *Ib.*
3. The petitioner for compensation under our Workmen's Compensation

*Workmen's Compensation.**Workmen's Compensation.*

- tion act, was using a barrel as one of the implements of his service; two strangers carried it away a short distance and petitioner was directed by his immediate superior, one of the servants of his employer, to recover it, and when petitioner approached the strangers they threw the barrel down and assaulted him and he was severely injured. *Held*, that the accident arose out of and in the course of his employment. *Nevich v. Del., Lack. & W. R. R. Co.*, 228
4. In a case under the Workmen's Compensation act, where the facts are disputed, a finding in favor of either party will not be disturbed, if there be evidence to support it, for a reviewing court will not weigh the evidence, the decision of the trial judge being, under the statute, conclusive if there be any evidence to support it. *Ib.*
5. A claim for compensation under the Workmen's Compensation act is barred by the lapse of one year from the date of the accident unless a petition is filed or an agreement for compensation payable under the act, is reached within such time. Neither the payment by the employer of the physician's bill for attendance during the first two weeks of disability nor an agreement that there shall be "no compensation" can properly be called an agreement such as may be reviewed by the Court of Common Pleas, under the authority of paragraph 21 of the act, on the ground that the incapacity of the injured employe has subsequently increased or diminished. *Benjamin & Johnes v. Brabban*, 355
6. A case under the Workmen's Compensation act, solemnly adjudicated on a petition and agreed statement of facts, should not be reopened for the purpose of allowing a party to make a new and distinct case. *Ib.*
7. An illegitimate child of the daughter of an injured workman is not a dependent of the daughter's father as defined in the Workmen's Compensation act of this state. *Splitdorf Electrical Co. v. King*, 421
8. The illegitimate child of a deceased workman's daughter is not a grandchild of such workman within the meaning of the statute. *Ib.*
9. Whether, in a proceeding under the Workmen's Compensation act there was a prior agreement between the parties to make compensation, under the statute, without resorting to the Court of Common Pleas by petition, is a mixed question of law and fact; and where there was testimony to the effect that the employer agreed to and did pay the petitioner periodically one-half of his weekly wages for some time after the accident, and also medical expenses incurred as a result of the petitioner's injuries, the trial judge was justified in finding that there was such an agreement. *DuPont De Nemours Co. v. Spocidio*, 438
10. An agreement, made within a year after an accident, between any employer and employe, for compensation due under the Workmen's Compensation act, for a less sum than that which may be determined by the judge of the Court of Common Pleas to be due, is a sufficient agreement under the act to relieve the petitioner of the duty of bringing his action within one year or otherwise be barred of his action. *Ib.*
11. The amendment of 1913 (*Pamph. L.*, p. 302), amending paragraph 12 of the Workmen's Compensation act of 1911 (*Pamph. L.*, p. 134), provides that if the widow of a deceased employe remarry during the period covered by weekly pay-

*Workmen's Compensation.**Workmen's Compensation.*

- ments, the right of the widow "under this section shall cease." *Held*, that a widow, whose husband was killed prior to the passage of the amendment of 1913, leaving her as his sole dependent, acquired a vested right to compensation during three hundred weeks, which could not be legally abridged by subsequent legislation, and did not, by her subsequent remarriage, forfeit her right to recover compensation payments for the full period fixed by the statute. *Hansen v. Brann & Stewart Co.*, 444
12. Though a widow remarried, she did not thereby cease to be the widow of the deceased husband. *Ib.*
13. A crossing flagman, employed by a railroad company engaged in interstate and intrastate commerce, was struck and killed by the engine of a train engaged in interstate commerce. *Held*, that the Court of Common Pleas of New Jersey is ousted of jurisdiction to award compensation under the New Jersey Workmen's Compensation act. The Federal Employers' Liability act is exclusive. *Flynn v. N. Y. Susq. & W. R. R. Co.*, 450
14. Although the findings of the Court of Common Pleas as to the facts in workmen's compensation cases are conclusive on appeal, nevertheless the law arising upon undisputed facts is a question of law for the court reviewing the decision to decide. *Ib.*
15. The supplement to the Workmen's Compensation act (*Pamph. L. 1913, p. 230*), which provides "that no person (*i. e.*, employe of the state, county or municipality) receiving a salary greater than \$1,200 per year" shall be compensated, under section 2 of the original act (*Pamph. L. 1911, p. 134*), applies only to employes of the class therein mentioned who were injured. It does not apply to cases of death where dependents of employes are affected. *Jersey City v. Borst*, 454
16. The Workmen's Compensation statute is a remedial law of prime import; it should be liberally and broadly construed. *Ib.*
17. Under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*), in the case of a partial but permanent loss of the usefulness of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, compensation shall bear such relation to the compensation therein provided for total and permanent disability as the partial but permanent disabilities collectively bear to total and permanent disability. *Orlando v. Ferguson & Son*, 553
18. In a case under section 2 of the Workmen's Compensation act (*Pamph. L. 1911, p. 134*, as amended by *Pamph. L. 1913, p. 302*), when the trial judge finds that there was a fifty per cent. loss of the usefulness of each hand, and a ten per cent. loss of the usefulness of one eye, he should then find what percentage of total and permanent disability the combination of fifty per cent. loss of the usefulness of two hands and ten per cent. of one eye make, and should then award as compensation that percentage of four hundred weeks. It is not strictly a mathematical problem. It is not to be solved by adding up the fractional parts, but upon the basis of the percentage of total and permanent disability reasonably found to be produced by the several injuries considered collectively and with due regard to their cumulative effect. *Ib.*

2000



